FOR ARGUMENT

Supreme Court, U. S.
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Nos. 77-983, 78-119 and 78-139

IN THE
Supreme Court of the United States
October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents,

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT INDIAN TRIBES

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IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents,

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT INDIAN TRIBES

OPINIONS BELOW

By order dated November 13, 1978, the Court consolidated three cases involving related decisions of the Supreme Court of the State of Washington, the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington. In No. 77-983, the State of Washington seeks review of the decisions of the Washington Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association* and *Washington v. Puget Sound Gillnetters Association*. In No. 78-119, the

State of Washington challenges the decision of the Ninth Circuit in the consolidated cases of *Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington* and *United States v. Washington*, and also challenges the separate decision of the court of appeals in *United States v. Washington* (the "International Fishery case"). In No. 78-139, the Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association seek review of the decision of the Court of Appeals in the Washington Fishery case, *supra*, and also seek review, pursuant to Rule 20 of the Rules of this Court, of the decision entered by the District Court on June 6, 1978, in *United States v. Washington*, Civ. No. 9213 (W.D. Wash).

Respondent Indian Tribes submit this single brief in all three cases.*

JURISDICTION

Respondent Indian Tribes concur in the Jurisdiction section contained in the Brief for the United States.

QUESTIONS PRESENTED

1. Whether the doctrine of *res judicata* bars the State of Washington and its non-treaty fishermen from relitigating in this Court issues previously determined in *United States*

*This brief is filed specifically on behalf of the Jamestown Clallam, Lower Elwa Clallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble Klallam, Puyallup, Quileute, Quinault Samish, Sauk-Suiattle, Skokomish, Snohomish, Snoqualmie, Squaxin Island, Steilacoom, Stillaguamish, Suquamish, Swinomish, Tulalip, and Upper Skagit Tribes. The Hoh Tribe is currently represented by the United States. The Quinault and Yakima Tribes are each filing separate briefs.

v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

2. If relitigation of the underlying issues is not barred by *res judicata*, whether treaties reserved to Indian tribes in the State of Washington an opportunity to take up to one-half of the harvestable numbers of any run of fish that normally would pass through the tribes' usual and accustomed off-reservation fishing places.

3. Whether, in light of the State of Washington's failure to adopt regulations permitting Indian fishermen their opportunity to fish, the District Court properly exercised its discretion by allocating the salmon harvesting opportunity for the 1977-1978 fishing season in accordance with the court's prior decisions.

4. Whether, in light of the State of Washington's unwillingness and inability to prevent its non-treaty fishermen from encroaching on the fishing rights of treaty Indians and, in light of substantial illegal fishing by such fishermen, the District Court properly enjoined state-licensed non-treaty fishermen from harvesting salmon in excess of their allocated opportunity.

5. Whether the State of Washington must manage and regulate its fisheries in compliance with federal court orders which implement federally-guaranteed treaty fishing rights, notwithstanding state statutes which allegedly bar implementation of such rights.

6. Whether the Court of Appeals correctly concluded that the matters at issue in the International Fishery case are now moot.

TREATIES INVOLVED

The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (12 Stat. 927):

> ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows . . .
>
> ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of lands, . . . All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; . . .
>
> ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing. . . .*

NOTE ON CITATION FORM

Materials in the Joint Appendix are cited as Joint App. Materials in appendices to the petitions for certiorari are cited as App....., Petition in No..... The clerk's pleadings are not contained in a single, consecutively paginated record. Citations herein to pre-trial pleadings and 1973 trial transcripts are referred to as Record in 9th Circuit Cause No. 74-2414. All post-trial transcripts are referred to by

*The full text of the treaty is set out in the appendix to this brief.

date alone. Pleadings, particularly those related to the "International Fishery" case are referred to as Record in 9th Circuit Cause No. 76-1042. Six volumes of clerk's pleadings, between September 1974 and December 1977, are contained in Record in 9th Circuit Cause No. 77-3654. Other District Court pleadings are referred to by District Court Docket Numbers alone, since the record was not available when this brief was filed. E.g. Docket No.....

The tribes will refer to the Petitioner State of Washington's Brief as State Br.; the Brief for Petitioners Puget Sound Gillnetters Association, Purse Seine Vessel Owners Association, et al. is referred to as Associations' or Gillnetters' Br.

STATEMENT OF THE CASE

INTRODUCTION

On January 31, 1855, at the close of the treaty negotiations, Issac Stevens, Governor of the Territory of Washington, met with the chiefs and headmen of the Makah Tribe at Neah Bay. The signing ceremony is recorded as follows:

> Tse-Kaw-Wootl (a chief of the Makahs) brought up a white flag and presented it saying, 'look at this flag, see if there are any spots on it. There are none, and there are none on our hearts.'
>
> Kalchote (another chief) presented another flag. 'What you have said was good, and what you have written is good.'
>
> The Indians gave three cheers or shouts as each concluded. The Governor then signed the treaty, and was followed by the Indian chiefs and principal men.

Ex. PL-16b at 4-5.

In similar scenes repeated throughout Western Washington, the Indian tribes and bands ceded title to vast areas of land and reserved for themselves in turn certain rights, including "the right of taking fish at usual and accustomed places in common with the citizens of the Territory." The presentation of white flags symbolized to the tribes their feeling that the United States had dealt fairly with them and that their right to fish, the nucleus of their culture, had been preserved.

The actual realization of that guarantee, however, has proved to be difficult.

These appeals, brought by the State of Washington and several associations of non-treaty fishermen and fishing interests, challenge the implementation by the federal court of its final declaratory judgment regarding Indian treaty fishing rights in the State of Washington, *United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975); *cert. denied,* 423 U.S. 1086 (1976), *rehearing denied,* 424 U.S. 978 (1976). They represent the culmination of an effort by the State and various citizens spanning seven decades of this century to prevent tribes from exercising certain treaty rights guaranteed to them by six treaties executed with the United States in 1855. Various aspects of this controversy have been before this Court on numerous occasions. *See United States v. Winans,* 198 U.S. 371 (1905); *Tulee v. Washington,* 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game* (*Puyallup I*), 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe* (*Puyallup II*), 414 U.S. 44

(1973); *Puyallup Tribe v. Department of Game* (*Puyallup III*), 433 U.S. 165 (1977). *See also Antoine v. Washington,* 420 U.S. 194 (1975).

In the proceedings below before the Ninth Circuit Court of Appeals, the State of Washington and two of the non-treaty fishing assocations jointly attacked the efforts of the District Court to implement its 1974 final judgment interpreting the treaties. The Court of Appeals confirmed its 1975 affirmance of the District Court's judgment and held that the judgment was not subject to collateral attack in these post-decision enforcement proceedings. *Puget Sound Gillnetters Association v. United States District Court,* 573 F.2d 1123 (9th Cir. 1978).

Puget Sound Gillnetters Association v. Moos, 88 Wn.2d 677, 565 P.2d 1151 (1977) and *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wn.2d 276, 571, P.2d 1373 (1977), No. 77-983, arose when several non-treaty fishing associations sued the State of Washington in state court and challenged the State's ability to implement treaty rights consistent with state law. They also argued that the District Court's determination of the meaning of the treaties was incorrect and should be reexamined. These efforts, basically uncontested by the State, resulted in two state Supreme Court decisions interpreting the treaties at variance with the federal judgments and holding that the State of Washington lacked power to give recognition to the treaty rights or comply with the federal court orders.

United States v. Washington, itself, was filed by the

United States, joined by a number of tribes, in 1970, to determine the scope and meaning of the off-reservation treaty rights reserved to the Washington tribes.

After a lengthy trial, the District Court entered its decision. The court, noting that the tribal usual and accustomed grounds were often located in terminal areas at the tail end of the salmon migration routes, found that the Indian fishing opportunity guaranteed by the treaties had been interfered with and in certain instances effectively preempted by state regulations.

In order to prevent State and non-treaty preemption of the treaty opportunity, and to "accommodate the rights of Indians under the Treaty and the rights of other people," consistent with this Court's requirement in *Puyallup II*, 414 U.S. 44, 49 (1973), the District Court decreed an allocation of fishing opportunity between the tribes and the non-treaty fishermen. The decision of the District Court reflects a comprehensive investigation into the anthropological and historical evidence regarding the role of fishing in the tribal economies and culture at the time of the treaties, the documentary and anthropological evidence regarding the negotiation of the treaties themselves and the understanding of the parties, (the tribes and the United States), the biological factors concerning the character of the resource and the management practices governing it, and the rules of law governing interpretation of Indian treaties. The Court concluded:

> The right secured by the treaties to the plaintiff tribes is a reserved right, which is linked to the marine and fresh water areas where the Indians fished during

> treaty times, and which exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.

Conclusion of Law 20, 384 F.Supp. at 401, Joint App. 195. In order to implement these principles, the court determined that the Indians were entitled to take 50% of the runs passing through their usual and accustomed fishing grounds.

Fundamentally, the State's brief represents an attack on the District Court's interpretation of the treaties, and on the factual underpinnings of the District Court's decision. It must be emphasized, however, that the District Court's decision was reached only after a comprehensive investigation of the facts and is strongly supported by expert testimony which the District Court found to be established by a preponderance of the evidence. The Ninth Circuit Court of Appeals affirmed these challenged findings of fact in 1975. A fair reading of the evidence establishes without doubt the depth of the District Court's scholarship and the methodical nature of its examination of the evidence. Unfortunately, in the briefs of the State and the Associations, even the actual findings of fact have been misstated. Since the original decision of the District Court is so largely grounded on the court's findings of fact concerning the circumstances surrounding the execution of the treaties, the understanding of the parties as to the meaning of the treaties, and the anthropological evidence

in general, it is critical that this Court be apprised of the actual facts as demonstrated by the extensive record in this case.

The District Court's thorough inquiry into these matters would not have been possible without expert testimony. The 253 annotated findings of fact and 48 conclusions of law reveal the court's extensive use of the testimony and reports of two anthropologists, Dr. Barbara Lane[1] and Dr. Carroll Riley. The anthropologists analyzed documents describing the setting and negotiation of the treaties at issue. Their testimony occupied five trial days consuming some nine hundred (900) pages of transcript in the record, in addition to written direct testimony. The court's decisions relied heavily on Dr. Lane's 534-page report[2], *Political and Economic Aspects of White-Indian Culture Contact in Western Washington in the Mid-19th Century*, Exhibits USA-20 to 30. The court stated:

> [T]he reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence. *They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties, including the treaty councils, Indian groups covered by the treaties, the purposes of the treaties and the Indians' understanding of treaty provisions. In these particulars, nothing in Dr. Lane's report and testimony was controverted by any credible evidence* in the case. Dr. Lane's opinions, inferences, and conclusions based upon the information stated in detail and well documented in her reports, appeared to the Court to be well taken, sound and reasonable.[3]

1. Dr. Lane's extensive qualifications are set forth in the appendix. Joint App. 351-53.

2. This report has been supplemented by additional anthropological reports covering additional Indian tribal intervenors, *see* Ex. USA-53, 72a, 73, 74, 75, 91, 92, 102, 103, 104 and 105.

Dr. Lane's ethnohistorical information is critical to an understanding of the treaties and is discussed in detail in Sections A and B below. The testimony of fisheries biologists and economists is discussed in Section C.

A. The Role of Fish in the Pre-Treaty Economy

It would be difficult to overemphasize the importance of anadromous fish to the large and complex native culture the eighteenth century European explorers discovered in the Pacific Northwest. The Indian population density was higher than almost anywhere else in native North America, north of Mexico[4]. The salient feature of the native economy was an abundance of anadromous fish which were available for harvest at predictable times and could be preserved for later use[5]. Although various cultural and political differences existed, a common cultural characteristic of all the Indian groups was the paramount dependence on the products of an aquatic environment, especially anadromous fish[6].

3. FF 2, 384 F. Supp. at 350, Joint App. 99 (emphasis added). The District Court noted that its evaluation of Dr. Lane's credibility was based upon the following factors:

> The anthropological reports and testimony of both Dr. Barbara Lane and Dr. Carroll Riley have been thoroughly studied and considered by the Court. In so doing, the Court has noted the nature, extent and duration of field work in the case area and academic research. During trial, constant observation was made of the attitude and demeanor of both witnesses while on the stand as witnesses, and the substance of their testimony has been carefully evaluated. Allowance for the criticism by defendants that some of Dr. Lane's conclusions are "over formulated" has been made in evaluating her testimony in every instance where the criticism might be applicable.

Id.

4. Ex. USA-20, Joint App. 363.

5. *Id.*

6. FF 3, 384 F. Supp. at 350, Joint App. 100.

Five species of Pacific salmon and the steelhead trout are indigenous to the Pacific Northwest. These anadromous fish are born in fresh water, spend their adult lives in the Pacific Ocean, then return to the precise location of their nativity to reproduce and die.[7] The Indians' lives in general were tied to this migratory cycle, and each tribe was tied to the distinct spawning units which invariably returned to its traditional tribal harvest areas.[8]

Anadromous fish were revered and respected by the tribes. Nearly all of the tribes performed a First Salmon Ceremony, designed to insure that the fish would perpetually return.[9] Other procedures insured that salmon were not wasted and that water pollution was not permitted. Refuse was never deposited in streams during the salmon season and the Skokomish even beached their canoes to bail them.[10] So central to the Indian culture were these fish that the Nisqually, for example, projected their preoccupation with fisheries in their perception of the stars. The constellation Orion was identified as three Indians catching small fish in schools. The Pleiades were described as a species of fish with large heads and small tails. The northern lights were viewed as schools of herring turning up the whites of their bellies.[11]

Fish were vital to the Indian diet. They were also a major element of Indian trade and economies.[12] Indian harvest and use of salmon and steelhead therefore re-

7. Steelhead can survive to spawn again.
8. *See* Ex. USA-20, Joint App. 367-68.
9. FF 6, 384 F. Supp. at 351, Joint App. 101; *See e.g.* Ex. USA-25, Joint App. 354-56.
10. Ex. USA-20, Joint App. 369.
11. Ex. USA-25, Joint App. 356-57.
12. FF 3, 384 F. Supp. at 350, Joint App. 100.

quired not only sophisticated fishing equipment, food preservation techniques and storage facilities, but also an exchange system.[13] Through trade, surplus fish could be converted into wealth. As Dr. Lane reported:

> Extensive trade was carried on among Indian groups in western Washington in order to acquire food stuffs, raw materials, and manufactured goods not available locally. The trade involved both basic necessities and luxuries of native life. The trade existed because different localities had different resources. The variation in local habitats is an important factor in understanding the native economy.[14]

Tribes in Eastern Washington traded across the mountains with tribes on Puget Sound.[15] The Makah Tribe, at the mouth of the Strait of Juan de Fuca, acted as middleman in the trade from the west coast of Vancouver Island down to the trading posts on the Columbia River. They traded ocean-going canoes, lumber, ceremonial masks, vermilion, slaves, blankets, and other items with tribes up and down the coast. They imported blankets, guns and kettles from the Europeans which they paid for with dried halibut, smoked salmon, processed oil and other items.[16]

For trade over long distances, the salmon were preserved by sun drying, wind drying, or smoking. The Indians also found markets for fresh fish among other tribal groups who desired fish of different runs (or fish from the same run caught in a different location), for variety in diet or for differences in keeping qualities.[17]

By treaty times the growing number of white settlers

13. Final Pre-Trial Order, docket No. 535, (hereinafter FPTO) §3-32, 3-33, Record in Cause No. 74-2414, R. 787-90.
14. Ex. USA-20, Joint App. 364.
15. George Gibbs, quoted in Ex. USA-20, Joint App. 370-71.
16. Ex. USA 21, Joint App. 399-404.
17. Ex. USA-20, Joint App. 367, 370.

created a substantial market for fish. Salmon were exported as well as traded for local consumption. All of these fish markets were supplied by tribal fisheries.[18]

The State of Washington incorrectly asserts that the volume of Indian trade in salmon was "inconsequential". State Brief at 28, citing FF 7 and 8.[19] In fact, the trade of salmon had wide geographic distribution and high volume. Indians captured millions of pounds of salmon annually.[20] Commerce in salmon was "the crux of the Indian economy in Western Washington.[21]

B. The Stevens' Treaties Protect Indian Fisheries

1. *The Europeans' Arrival Increased Demands for Indian-Caught Fish.*

In 1790, Manuel Quimper commanded the first European expedition to venture into and explore the inland salt waters of Western Washington. Vancouver, sailing for Great Britain, conducted further exploration of the Strait of Juan de Fuca and Puget Sound in 1792. Both Quimper and Vancouver reported trade with Indians for fish.[22]

By treaty with Spain in 1819, the United States began the process of extinguishing the claims of other sovereigns to the wealth of the Pacific Northwest. An agreement was reached with Russia in 1824, followed by a treaty with Great Britain in 1846 under which these nations essen-

18. FF 7, 384 F. Supp. at 351, Joint App. 102; Er. USA-20, Joint App. 371; Ex. MLQ-1 at 13.

19. The testimony cited in FF 7, 384 F. Supp. at 351-53, Joint App. 102 shows that the witness, in the absence of catch statistics for the times in question could not make a comparison and described the situation as therefore "not comparable" not "inconsequential." FF 8, *Id.* at 352, Joint App. 102-03, deals with then undeveloped *non* Indian fisheries.

20. Ex. MLQ-1, Joint App. 335.

21. Ex. JX-2a, Joint App. 341-42.

22. R. Whitebrook, *Coastal Exploration of Washington* 56-61 (1959).

tially quit-claimed the region to the United States. By United States law, the United States Government alone could obtain clear title from the Indian tribes,[23] and this the United States was anxious to do. The Federal Government, anticipating settlement of the area by white settlers, wished to avoid friction between Indians and settlers over use of property rights.

White settlers began to reach the Western Washington area by land in the 1840's. In 1848 the United States created the Oregon Territory, of which the Puget Sound country was a part.[24] The Territorial Act explicitly preserved "rights of person or property now pertaining to the Indians,"[25] and extended the application of the Northwest Ordinance provisions calling for "good faith" dealings with the Indians.[26] However, the influx of white settlers brought strong demands for prime agricultural lands. Congress and the Executive, therefore, authorized Isaac Stevens to negotiate treaties with the tribes in order to avoid hostilities and the possibility of a prolonged and distant war.[27] The Federal government hoped to thereby consolidate and protect the Indians on residential reservations, thus freeing land for settlement and enclosure by the white settlers.[28]

The treaty negotiators did not wish to interfere with Indian commercial fishing; to do so would have been

23. "No . . . conveyance of lands . . . from any Indian nation or tribe . . . shall be of any validity . . . unless . . . made by treaty . . . pursuant to the Constitution" 4 Stat. 730 (1934) codified as 25 U.S.C. §177.

24. Act of August 14, 1848, 9 Stat. 323.

25. FF 15, 384 F. Supp. at 353-4, Joint App. 106-7.

26. *See Id.*

27. Act of June 5, 1850, 9 Stat. 437.

28. Lane testimony, Joint App. 263-65; FF 19, 384 F. Supp. at 355, Joint App. 108.

highly inconvenient since Indian fishermen caught most of the fish used by the whites.[29] Early non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful so the settlers relied on Indians for fish.[30] In addition to their traditional trade with other Indian groups, the Puget Sound tribes supplied the growing market for fresh fish, and sold large quantities of salted salmon to the Hudson Bay Company for shipping to markets in New York, San Francisco, China, South America, Hawaii, and Great Britain.[31] As Dr. Lane reported:

> Available evidence suggests that Indian fishing increased in the pre-treaty decade for three major reasons: (1) to accommodate increased demands for local non-Indian consumption and for export; (2) to provide money for the purchase of introduced commodities like calico, flour, and molasses; and (3) to obtain substitute non-Indian goods for native products no longer available because of non-Indian movement into the area.[32]

Non-Indians did not engage in fishing as competitors on any scale until the late 1870s.[33] Instead the settlers concentrated on agriculture, mining and logging. Thus, for many reasons, by the time the Stevens treaties were negotiated, Indians were deeply engaged with non-Indians in commerce in fish.[34] When the United States asked the tribes to cede their land, therefore, the tribes asked for a guaranteed right to their fisheries.

29. FF 7, 384 F. Supp. at 351, Joint App. 102.
30. FF 8, 384 F. Supp. at 352, Joint App. 102-103; Ex. USA-20, Joint App. 371.
31. FF 8, 384 F. Supp. at 352, Joint App. 102-103; Ex. USA-20, Joint App. 371-72.
32. Ex. USA-20, Joint App. 372.
33. *Id.*; FF 8, 384 F. Supp. at 352, Joint App. 102-03. In 1853 an Olympia, Washington magazine exhorted the settlers to greater efforts saying "what little has been done in the business of securing the salmon, has been done solely by the Indians." Ex. USA-20, Joint App. 372.
34. Record in 9th Circuit Cause No. 74-2414, Tr. 1778-84.

2. *The Intent of the Treaty Negotiators.*

The treaties negotiated by Governor Stevens and the Indian tribes were clearly designed to protect both Indians and settlers.[35] They extinguished tribal title to the lands so that the settlers could obtain United States land patents for their claims, and the tribes received assurance of federal protection of their reserved lands and fisheries. As Dr. Lane observed:

> [T]he reservations were to be residential bases from which *the Indians were to continue to utilize* the total environment, including specifically *all of their fishing locations, in order to maintain themselves and to contribute to the economy of the entire population.* . . . The treaty commission clearly undertook to provide the Indians the means of participating and prospering in the economy of the Territory. *The contribution was seen to be primarily in the fisheries."*[36]

Communication between the parties during the negotiations was obstructed by both language and cultural barriers. The vast majority of Indians at the treaty councils did not speak or understand English so the treaty provisions and the remarks of the commissioners were interpreted by Colonel Shaw in Chinook jargon. Chinook was then translated into native language by Indian interpreters, since many of those present did not understand Chinook jargon.[37] The evidence indicates that there were no words in the Chinook jargon for "common", "usual", "accustomed", "citizens", "steelhead", and other phrases which have become controversial in interpretation of the treaties.[38] The treaties themselves are written in English; the clauses were essentially drafted before any formal meeting at a

35. Lane testimony, Joint App. 265.
36. Ex. USA-20, Joint App. 396 (emphasis added).
37. FF 22, 384 F. Supp. at 355, Joint App. 110.
38. *See*, Dictionary of the Chinook Jargon, Ex. G-29(a) and Ex. Y-21.

treaty ground.[39] With some exceptions the treaty signatories representing the tribal units were important men of the winter villages who had some prior contact with non-Indians or spoke some Chinook jargon.[40]

A more serious problem was that the system of Indian tenure and ownership rights in fish asserted by some tribes was foreign or unknown to the whites. This is clearly illustrated in the negotiations with the Makah.[41] Nootkan culture, of which the Makah were a part, recognized ownership rights to anything that the tides or waves deposited on a member's section of beach. It also recognized ownership of ocean tracts. As Dr. Lane reported:

> In the official record of the treaty proceedings, one entry reads:
>
> *Tse-Kaw-Wooth* – he wanted the sea – that was his country.
>
> Tse-Kaw-Wooth was the leading man of the Ozette Village and was chosen by Stevens as head chief for the Makah at the time of the treaty. From later reports we know that the Ozette owned important fishing rights on the halibut banks northwest of Tatoosh Island. It seems likely that these were what Tse-Kaw-Wooth was asserting rights to at the treaty.[42]

The Nootkans recognized ownership not only of rivers and fishing places close at hand, but of the waters of the sea for miles off shore, all of which were privately owned

39. Lane Testimony, Joint App. 273-75.

40. Ex. USA-20, Joint App. 384, 368. The State incorrectly indicates that the United States Commissioners "created tribes and bands" State Br. at 31. Stevens, as instructed, simply amalgamated pre-existing bands and village units into larger tribes for the convenience of both sides. It eliminated the necessity of traveling to meet with, and record the agreements of, each of the tribal units. Dr. Lane's reports clearly reveal that Stevens did not "create" the tribes and bands, *see* Ex. USA-20, Joint App. 385-93.

41. Ex. USA-21, Joint App. 410.

42. *Id.* at 413.

property.[43] These were foreign concepts, not comprehended by the United States negotiators at the treaty talks.[44]

Despite these problems, some key concepts were capable of communication. Dr. Lane reported that the essence of the phrase, "the right of taking fish, at all usual and accustomed grounds and stations, is further secured" could have been conveyed in Chinook jargon.

> The English word fish is "pish" in Chinook jargon. Presumably this generic term was used in the treaty talks and it is likely that it would have been understood by the Indians in the same sense as the whites.[45]

The promise to preserve and protect the signatory tribes' opportunity to harvest anadromous fish, was quite explicit during the negotiations. "This paper," said Isaac Stevens to the tribes gathered at Point-No-Point, "secures your fish."[46]

The fish harvesting right secured by the treaty was not qualified or restricted. Dr. Lane concluded:

> It is my opinion that no such restrictions were indicated by the commissioners or contemplated by the Indians. The treaty Commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture, but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue—the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the Territory. I believe that both parties intended the Indians to continue full use of their fishing places. . . .[47]

43. *Id.*, at 413-14.

44. *Id.; See e.g.*, Ex. USA-20, Joint App. 376-77; Lane Testimony, Joint App. 272.

45. Ex. USA-20, Joint App. 382.

46. Ex. PL-15, Joint App. 331.

47. Ex. USA-20, Joint App. 382. The State's repeated assertion that the negotiators protected only "the limited purpose of seeking food" State Br. 44, 32 or the Indians "a means of subsistence" State Br. 48, is simply contradicted by the facts. *See* Joint App. 396; 384 F. Supp. at 343 n. 29, Joint App. 89.

The additional phrase in the treaties, "in common with all citizens of the Territory" at first appears to create an ambiguity. George Gibbs himself used the term "common" as applied to fisheries, in more than one sense.[48]

Nevertheless, there is substantial evidence from which the parties' intent regarding the manner in which the resource was to be shared can be confidentially inferred.

Dr. Lane found no direct evidence whether "in-common" was intended to connote fishing at the same place, or on the same run, or something else.[49] Dr. Lane testified further, for example, that the Indians were plainly agreeing to share the waters of Puget Sound with the non-Indians.[50] That was completely consistent with the established system of Indian property rights which, Dr. Lane testified included "notions of free extension of use rights to friends, neighbors, visitors and so on in no way impeding ownership or title to these right."[51] Dr. Lane testified:

> Concepts of ownership were highly developed and rather precisely formulated, not only in Twana culture, but in most, if not all, cultures of the Northwest Coast. While use rights were freely extended, it was necessary for the borrower to request permission to use the privately owned site, gear or privilege and for the owner to accede to the request. Alternatively, the owner could initiate the extension of use rights by offering them.[52]

Similarly, Dr. Lane testified:

> The "in-common with" language must have been understood and intended by both parties to assure non-Indians an opportunity to engage in fishing, but not at the expense of existing Indian claims and rights. . . . [It] was intended to allow non-Indians to fish subject to prior Indian rights specifically assured by treaty.[53]

48. For example, the records of the treaty Commission show that George Gibbs' outline draft of the treaty referred to fishing thus, "The right of fishing at common and accustomed places is further secured to them: Proviso against staked or fenced claims." Ex. PL-10(b).
49. Ex. USA-20, Joint App. 383.
50. Lane Testimony, Joint App. 284.
51. Lane Testimony, Joint App. 276.
52. Lane Testimony, Joint App. 260.

Dr. Lane's conclusion regarding the parties' intent was not "controverted by any credible evidence".[54] In addition, the concept of relinquishing one-half their rights was not unknown to the tribal negotiators. This notion was espoused at the treaty of Neah Bay:

> *Ka-bach-sat of Tso-yess* – My heart is not bad but I do not wish to leave all my land. *I am willing you should have half, but I want the other half myself.* You know my country, I want part for my village. It is very good. I want the place where the stream comes in.
>
> *It-an-da-ha of Waatch* – "My Father! My Father. I now give you my heart. . . . *My wish is like the rest.* I do not wish to leave the salt water. *I want to fish in common with the whites.* I don't want to sell all the land. *I want a part in common with the whites* to plant potatoes on. I want the place where my house is. We do not want to say much, we are all of one mind.[55]

To these tribal negotiators using the fisheries and the lands "in common with" the whites was consistent with the idea that each could take up to one-half.[56] The bountiful fish

53. Ex. USA-20, Joint App. 396-97.
54. FF 2, 384 F. Supp. at 350, Joint App. 99.
55. Ex. PL-16(b) at 3.
56. There is also evidence outside the record that the understanding of at least some of the United States negotiators was similar. At another council between the tribes and Isaac Stevens shortly after the treaties, S. S. Ford, a participant in the negotiations, referred to the fishing provisions of the Medicine Creek Treaty as, "Offering you for fishing privileges *one-half of the waters of the rivers and Sound*, offering to protect you in your rights. . . ." Fox Island Council Proceedings, Executive Order of January 20, 1857, Executive Order File 1850-92, Records of Bureau of Indian Affairs, Record Group 75, National Archives, Washington, D.C. (emphasis added).

resources of the era implied that there would be no limitation of the tribes' existing uses of the fisheries, particularly since the Indians did not expect the non-Indians to use the tribal fishing locations at the same time.[57] As Dr. Lane concluded:

> [T]he Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but that as owners of these rights, in the native way of looking at things they were extending use rights to the non-Indians to share in the resources, but I don't think . . . they thought they were giving up anything.[58]

The Indian concern with permanently retaining "their ownership over the fishery resource"[59] is to be contrasted with their lesser concern with off-reservation areas for pasturing their horses. The treaty clauses secure the "right of taking fish" and go on to say,

> together with the *privilege* of hunting, gathering roots and berries, and pasturing their horses *on open and unclaimed lands;*[60]

The United States representatives, at least, understood that the land was going to be heavily populated and that game would be reduced,[61] and the availability of public grounds diminished as settlers came to use more of the open areas. This prospective diminishment of their hunting, gathering and pasturing privileges contrasted with the outright ownership language describing their right in fisheries. As Dr. Lane stated:

> [T]here is a distinction clearly made here between this kind of ground and then the privilege of using

57. Lane Testimony, Joint App. 271.
58. *Id.* at 271-72.
59. *Id.* at 273.
60. Medicine Creek Treaty, Ex. PL-31 (emphasis added).
61. Lane Testimony, Joint App. 268-69.

> these—the right of taking their fish at all their usual and accustomed places. To me the two are being separated quite clearly in this clause.[62]

It must also be emphasized that the United States delegation was clearly cognizant of the Indians' domination of the fishery trade. A December 30, 1854, letter from Isaac Stevens notes:

> The Indians on Puget Sound have been for a considerable time in contact with the whites . . . *They form a very considerable proportion of the trade of the Sound.* . . . They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it.[63]

The government negotiators indicated that the Indians should be self-sufficient, able to continue the trade of fish with non-Indians and other tribes.[64] For example, members of the commission at the Treaty with the Makah (Stevens, Gibbs, Shaw, and Simmons) were aware of the commercial nature and the value of the Makah marine economy,[65] and they promised the Makah that the United States would

62. *Id.* at 269.
63. Ex. PL-11, Joint App. 329. Stevens went on, however, to make certain hasty observations that Indians did not use the same fishing methods, i.e. seines and nets, as whites. These observations were erroneous. As Dr. Lane reported, "The Puyallup Indians . . . were using both seines and weirs extensively at the time that Stevens wrote and had been doing so for some years previous . . . . The other members of the treaty commission were certainly aware of Indian methods of taking fish . . ." Ex. USA-20, Joint App. 383. The State regretably chose to emphasize the erroneous statement without acknowledging the error. State Br. 47.
64. Ex. USA-20, Joint App. 382.
65. Washington's reliance, State Br. 48 n. 26, on a finding of the Indian Claims Commission that the treaty with the Makah was not a guarantee of future commercial fishing rights, is misplaced. The Commission specifically overturned that finding in 1976 and found that the intent of the Makah treaty *was* to provide for continuation of the extensive Makah maritime trade, 39 Ind. Cl. Comm. 88, 100. By a later order the Commission adopted the United States District Court's findings regarding the United States' intention to maintain, by the treaty, the thriving pre-treaty Makah commercial fisheries. 40 Ind. Cl. Comm. 131, 132-33.

assist them in developing their maritime industry. By his promise of kettles and fishing apparatus to the Makah, Governor Stevens clearly indicated that he did not intend by the treaty to restrict the Indians to aboriginal equipment or techniques.[66]

Both anthropologists testified that the treaty negotiators sought to protect continued Indian fish harvests from possible future restriction. Dr. Riley testified that the treaty commissioners had no thought that the Indians ever would be restricted in their fishing.[67] Dr. Lane testified that the Indians believed that they would never be controlled in their fishing by any non-Indian government and could go on fishing as they did before.[68] Evidently both the United States representatives and the Indians themselves intended that Indian fishing would continue as it had before the treaties: non-Indian settlers would also have access to the Indian fisheries but without interfering with the continued pursuit of traditional Indian fishing.[69] The District Court in *United States v. Washington* expressly found that "[t]here is no indication that the Indians intended or understood the language 'in common with all citizens of the Territory' to limit their right to fish in any way;" the Court of Appeals upheld this finding.[70]

The United States acted in good faith in providing for protection of tribal fisheries.[71] This was consistent with the Northwest Ordinance of 1787, 1 Stat. 51, Note a, which

66. FF 62, 384 F. Supp. 363-64, Joint App. 124-25.
67. Record in 9th Circuit Cause No. 74-2414, Tr. 2381.
68. Record in 9th Circuit Cause No. 74-2414, Tr. 1863, 1875, Joint App. 271; *see* FF 20, 21, 384 F. Supp. 355, Joint App. 109.
69. Ex. USA-20, Joint App. 383; *see* FF 26, 20, 384 F. Supp. 357, 355, Joint App. 112, 109.
70. 384 F. Supp. 312, 333, Joint App. 71-72; *see* 520 F.2d 685, Joint App. 46.
71. *See* Ex. USA-20, Joint App. 396-97.

requires that "good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent."[72] As George Gibbs reported:

> What is necessary for them, and just in itself, is, that small tracts of good land should be set apart as permanent abodes. . . .
>
> In like manner, *the use of their customary fisheries* . . . should be secured.[73]

There was no intention of creating a class society with the Indians on the bottom economic rung. There was no intent to prevent the Indians from using the fisheries for economic gain. Rather, the treaty commission clearly undertook to provide the Indians the means of participating and profiting in the economy of the territory.[74] Isaac Stevens transmitted the treaties to Washington, D.C. for ratification saying,

> The provisions as to reserves and as to taking fish, . . . *had strict reference* to their condition as above, to their actual wants and *to the part they play and ought hereafter to play in the labor and prosperity of the territory.*[75]

In conclusion, the repeated assertion of the State of Washington in its brief that the treaties were designed only to reserve to the tribes a right of access to their traditional fishing grounds has no support in the evidence. Based on the actual documentary evidence presented and the testimony of the expert witnesses as outlined above, the District Court rejected the State's interpretation of the treaties and the 9th Circuit Court of Appeals affirmed his conclusion.

72. FF 15, 384 F. Supp. 353-54, Joint App. 106.
73. Ex. PL-9, Joint App. 326 (emphasis added).
74. Ex. USA-20, Joint App. 396; *see* FF 21, Joint App. 109.
75. Ex. PL-11, Joint App. 329, *cf.* n. 63 *supra*.

C. Preemption of Indian Fisheries and Overfishing by Settlers

Initially, at least, the intent of the treaty parties was generally followed. During the 1850's, 1860's and 1870's Indian fishing and Indian trade in fish was an integral part of the pioneer economy.[76] Before Washington was admitted to the Union in 1889, most interference with treaty Indian fishing stemmed not from acts of the legislature but from settlers' attempts to monopolize traditional Indian fishing spots. Such interference gave rise to the first reported litigation regarding the treaties' effect. In *United States v. Taylor,* 3 Wash. Terr. 88 (1887), the United States and Yakima Indians complained that they were prevented from reaching a traditional site on the Columbia River by a land owner's fences. The Supreme Court of the Territory construed the treaty in favor of the Indians:

> [I]t seems to us that the Indians in making the treaty would have been more likely to have intended to grant only such rights as they were to part with, rather than to have conveyed all, with the understanding that certain rights were to be at once reconveyed to them. . . .
>
> It will be seen by the statement of facts above set out that *at the time this treaty was made there existed within the territory* which was the subject-matter of the treaty, *certain ancient fisheries* which had for generations been used as such by said Indians, who had certain well-defined habits and methods connected with such use.[77]

Preemption of Western Washington Indian fisheries by non-Indians was infrequent during the two decades following the treaties. Heavy white settlement came later to

76. Ex. USA-20, Joint App. 393.

77. *United States v. Taylor,* 3 Wash. Terr. 88, 96-97, (1887) (emphasis added).

that region and early settlers in the Puget Sound area concentrated on agriculture.[78] Development of the canning process, however, greatly increased the interest of investors and non-Indian fishermen in the commercial potential of Washington's anadromous fish runs. The first cannery was built on Puget Sound in 1887 although production was minimal until the middle 1890's.[79]

Responding to the new market created by the canneries, settlers adopted a traditional efficient Indian fishing technique, the fish trap;[80] and non-Indian commercial fisheries grew by leaps and bounds. From three canneries in 1894, the Puget Sound industry expanded to 24 canneries in 1905. Investment syndicates formed companies to operate both canneries and huge new traps.[81] Efficient trap fishing requires that the trap be located so as to intercept salmon traveling along the shoreline toward their natal rivers. Because some locations were better than others, conflicts developed between Indians and settlers.[82] In 1898 settlers frustrated the Lummi Indian's traditional use of Semiahmoo Spit and their practice of going to Point Roberts to catch and dry fish during the bountiful runs of Fraser River salmon. Settlers claimed the shores beside the Indian fishing site and drove away at gun-point native reefnetters who tried to erect temporary fish-drying houses

78. Ex. MLQ-1, at 18.

79. FF 8, 384 F. Supp. at 352, Joint App. 103.

80. A discussion of traps and examples are found at Ex. JX-2a, §3.1.3 at 112 and Fig. 46. *See also* Ex. PL-88.

81. Ex. MLQ-1 at 3, 19, Chart 6. Some of the trap sites became extremely valuable. In 1899, the Pacific American Fish Company of Chicago spent one million dollars to acquire control of inner Sound trap sites. Individual sites sold for between $5,000 and $55,000 with an average of almost $20,000; by 1917, many sites were valued at over $100,000. R. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique,* 13 (University of Washington, monograph series, 1977).

82. Ex. MLQ-1 at 19, 18.

on the shore.[83] The tribes' fear that they would be pushed out of their usual and accustomed sites, voiced in the treaty negotiations[84] had been realized.

Heavy harvests by non-Indian trap and cannery crews also brought about the need to restrict fishing for conservation's sake.[85] As Dr. Lane testified, it is likely that the United States treaty commissioners foresaw the need for such restrictions, although they did not contemplate that the Indian fisheries would be restricted.[86] Forty years later, the consequences of an unrestricted non-treaty fishery were clear. "In the history of the salmon fisheries of the Atlantic Coast", said one Washington Fish Commissioner, "there is a warning against the extravagant manner in which our Pacific Coast salmon fisheries have been carried on for many years past."[87]

Increased settlement and the introduction of canneries created the economic incentive for non-Indians to exclude Indian tribes from the commercial salmon fishery. Statehood provided the political means to accomplish this. Legislative restriction of Indian commercial fishing began almost as soon as Washington was admitted to the Union on November 11, 1889. State enactments took widely varying

83. *See* Ex. PL-94(u). A suit to halt the interference was unsuccessful, *United States v. Alaska Packers Ass'n.*, 79 F. 152 (D. Wash. 1897). The District Judge in *Alaska Packers* relied on a theory of treaty interpretation later rejected by the Court in *United States v. Winans,* 198 U.S. 371 (1905).

Regarding the Point Roberts trap fishery, *see generally,* R. Rathburn, "A Review of the Fisheries in the Contiguous Waters of the State of Washington and British Columbia", Part XXV of *Report of the Commissioner,* U.S. Comm. of Fish and Fisheries, Year Ending 1899, 300-303.

84. Riley testimony, Joint App. 295.

85. FF 8, 384 F. Supp. at 352, Joint App. 102-03.

86. Lane testimony, Joint App. 262-63, *see* n. 69 and accompanying text, *supra.*

87. *Ninth Annual Report of the Washington State Fish Commissioner,* 25, *see also* 26, 33-40 (1898), series hereinafter *Commissioner's Report.*

forms, since there was no technical staff to guide the legislature.[88]

In the 1890 session, all salmon fishing was outlawed for three months each year.[89] In the early 1890's, the State began licensing and prescribing permissible types of fish traps and times of operation.[90] Later, the legislature specifically prohibited spearing, gaffing, snagging and snaring fish.[91] Each of these enactments effectively curtailed treaty Indian fishing.[92]

Restriction of treaty Indian commercial fishing resulted also from the non-Indian view that conservation required curtailment of fishing in rivers and streams but not in the salt water areas of Puget Sound.[93] In 1897 and 1899 the legislature halted fishing in all Puget Sound tributaries and nearby bays.[94] Such freshwater closures varying in extent, have been enacted repeatedly by nearly every Washington State legislature from 1897 to the present.[95] They have drastically curtailed fishing at the most lucrative Indian fishing places—forks in rivers, outlets of rivers into lakes, and saltwater estuaries.[96] Each of the areas closed was a usual and accustomed fishing place of one or more tribes.[97]

88. Ex. JX-2a at 60. Regulations could not be changed between legislative sessions to accomodate salmon run conditions. Regulation by statutory enactment was used until establishment of a Department of Fisheries with regulatory authority in 1921. *See* Wash. Sess. Laws, Ch. 7, §116 *et. seq.* (1921).

89. *Wash. Sess. Laws,* 107 (1890); *see* Ex. JX-2a, Table 25.

90. *Wash. Sess. Laws,* 233 (1890); *Wash. Sess. Laws* Ch. IX at 15-18 (1893); Ex. JX-2a, Table 25; *First Commissioner's Report* 18-22 (1890).

91. *Wash. Sess. Laws,* Ch. 31, §72 (1915).

92. *Cf.* FF 10, 384 F. Supp. at 352, Joint App. 103-04.

93. *See e.g.,* Fish Commissioner Crawford's view, *Third Commissioner's Report* 18-21 (1892).

94. Ex. JX-2a, Table 25.

95. *Id.,* Tables 25, 26, 27, 28.

96. E. USA-20, Joint App. 375.

97. *See* FF 10, 12-13, 384 F. Supp. at 352-53, Joint App. 103-05; *and* FF 35-163, 384 F. Supp. at 359-82, Joint App. 115-60.

In later years, the Department of Fisheries expanded the freshwater closures to saltwater areas of Puget Sound it called "salmon preserves." The effect was to outlaw fishing in most of the remaining usual and accustomed grounds of the Makah, Lower Elwha, Skokomish, Squaxin Island, Nisqually, Puyallup, Tulalip, Stillaguamish, Swinomish, Upper Skagit and Sauk-Suiattle Indian Tribes.[98] This effect is graphically illustrated by a map in the Joint Appendix.[99] Most importantly, harvest of the same anadromous fish runs elsewhere on their migration route was *not* restricted. Non-treaty fishermen could and often did capture the entire harvest before the fish returned to tribal fisheries near their natal streams.[100] Furthermore, despite official concern that the non-treaty recreational fisheries were overharvesting some runs and cropping fish before they could mature, fishing area closures were generally inapplicable to that group of fishermen.[101]

Over the years, before 1974, State regulations designed to restrict the harvest of anadromous fish were "apparently based more on political realities than on economic considerations."[102] As another economist has said, the "dis-

98. *See* Ex. JX-2a at 64, Fig. 18, and Appendix III; *cf.* n. 97.

99. Joint App. 348, *see also* Ex. JX-2a, Figure 18.

100. FF 217-18, 384 F. Supp. at 393, Joint App. 179-80.

101. Ex. JX-2a at 63, *and* Tables 26-28. The 1931 Annual Report of the Washington Department of Fisheries, for example, identified the growth of sport fisheries as a serious management problem:

> Sport fishing activities in saltwater areas, growing by leaps and bounds through the natural call of the outdoors, easy access to fishing grounds, and goaded on by advertising propaganda, have developed to the point where it is conservatively estimated for one instance, that the total number of young chinook salmon, each one pound or under, taken every year exceed the total number of mature chinooks, weighing twenty pounds or more when caught by commercial fishermen. . . . The enormous difference in commercial value to the State as a whole from the catch of mature salmon as compared to the value of the immature fish taken is very obvious. 40-41 *Report of the Washington State Department of Fisheries* (1929-31), series hereinafter *Fisheries Report*.

102. Ex. MLQ-1 at 4.

tribution of the salmon [harvest] is best understood as the product of a balance of power."[103] The treaty tribes, of course, had little role in this political process since their members were not made United States citizens until 1924.[104]

Issues raised by the state-authorized non-Indian preemption of the fish runs came before the United States Supreme Court in *United States v. Winans*, 198 U.S. 371 (1905). The case concerned a settler along the Columbia River who had placed four fish wheels along 1½ miles of the river bank and sought to exclude tribal fishermen from their usual and accustomed fishing place. The Court noted that the Yakima tribe's right to resort to traditional fishing places was "not much less necessary to the existence of the Indians than the atmosphere they breathed."[105] Winans argued that white men had greater capacity than Indians to devise and use fishing gear to take advantage of the common right. The Court replied:

103. R. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique*, 24 (University of Washington, monograph series, 1977).

The State opines that in addition to regulating for conservation there must be regulation for "optimum yield." *See*, State Br. at 19-20. This, of course, is just another term for political allocation:

"To say the least, the concept (of optimum yield) is potentially subject to abuse, and would almost certainly be used primarily as a way of justifying a political course of action." Larkin, *An Epitaph For The Concept of Maximum Sustained Yield*, 106 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY at 8 (1977).

"The best thing about the term optimum yield is that it leaves all sorts of options open for everyone. . . . [E]ach one of us can define the optimum yield of any fishery to suit ourself." Crocker, *Usefulness of the Optimum Yield Concept*, AMERICAN FISHERIES SOCIETY, SPECIAL PUBLICATION NO. 9 (1975), at 75-76.

"The nebulous nature of this standard, however, renders it ineffective in providing a basis for decision making. 'Optimum yield' becomes merely a 'best' yield, to be defined on an ad hoc basis by decision makers." Christy, *The Fishery Conservation and Management Act of 1976*, 52 Wash. L. Rev. 657, 658 (1977).

104. Act of June 2, 1924, c. 233, 43 Stat. 253.

105. 198 U.S. at 381.

> It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common.[106]

The attempt to monopolize the fishery was struck down.

In *Seufert Brothers v. United States,* 249 U.S. 194 (1918), this Court extended its ruling to areas outside those ceded by the Yakima treaty, quoting with approval its ruling in *Winans:*

> We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules'.[107]

Despite the Supreme Court's rulings in *Winans,* it was not long before Washington state courts joined the attack on Indian fishing rights. Two state court decisions *State v. Towessnute,* 89 Wash. 478, 154 P. 805 (1916) and *State v. Alexis,* 89 Wash. 492, 154 P. 810 (1916), suggested that Indians no longer had a lawful right to fish outside of reservations except as permitted by state law. The state court's attitude is revealed in the *Towessnute* opinion.

> The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aboriginies as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. . . . Only that title was esteemed that came from white men, . . .

106. *Id.* at 382.

107. *Seufert,* 249 U.S. 194, 198 quoting, *United States v. Winans,* 198 U.S. 371, 380-81 (1905), and cases cited therein.

> The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence.
>
> These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailities, has been continuously displayed. Neither Rome nor sagagious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

89 Wash. at 481-82, 154 P. at 807.[108]

Far more damaging to Indian fisheries than state-encouraged obstructed access to usual and accustomed places however, was the development of a new saltwater fishing technology which included powerful purse seine and gillnet boats.[109] Indian fisheries are largely place oriented, emphasizing anchored or staked fishing appliances.[110] By fishing earlier in the salmon migration path than traps and other fixed gear, purse seines reduced the number of fish reaching the trap sites and thus robbed Indians of their locational advantage.

108. Even on Indian reservations, where the federal government retained exclusive control, (*See* FF 16, 384 F. Supp. at 354, Joint App. 107) the State made early efforts to control Indian fishing. The agent for the Tulalip Reservation reported that in 1913 two Lummi Indians were arrested while fishing within the boundaries of their reservation. When the case resulted in an acquittal, the State Fish Commissioner threatened to arrest Indians again and again for the same offense. Buchanan, *Rights of Puget Sound Indians to Game Fish,* VI Wash. Hist. Quart. 109 (April, 1915).

109. Pictorial representations of modern gear are shown in Figure 48, Ex. JX-2a.

110. Ex. JX-2a, Joint App. 340, 342.

As early as 1903, American purse seiners became a significant factor in the profitable sockeye fishery when the advent of gasoline-powered boats greatly increased their mobility. By 1910, the three major types of fishing gear used today were well established in Puget Sound, each in its area of most efficient use: (1) gillnets in streams and murky estuaries in the day, at night spread throughout the Sound; (2) traps in shallow water, especially in estuaries; and (3) purse seines in deep water on the approaches to river mouths and the Strait of Juan de Fuca.[111]

As non-Indian marine fishermen intercepted increasing numbers of fish before they reached the rivers, the Indians found their livelihood dwindling. Dr. Lane summed up these developments:

> As non-Indians began to compete in the fisheries, laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen. As they have been forced out of the fisheries, fewer Indians and smaller quantities of fish are involved.[112]

On this point, the State in its brief misrepresents a finding of fact of the District Court in order to obscure the responsibility of the State of Washington for the decline in the treaty fisheries. The State argues:

> During this period there was a drastic decline in the number of Indians whose principal occupation was fishing. (FF 33, Joint App. 114.) *The* major cause for this decline was the employment acculturation of the Indians. (FF 33, Joint App. 114.)

State Br. at 29 (emphasis added).

111. Ex. MLQ-1 at 21-22.

112. Ex. USA-20, Joint App. 393; *cf.* FF 217-18, 384 F. Supp. at 393, Joint App. 179-80.

What the District Court actually found was:

> Employment acculturation of Indians has been *a* major cause of the drastic decline from treaty times of the number of Indians engaged in fishing. [citations to record omitted] *Additionally, many years of state enforcement actions against Indians exercising their claimed treaty right to fish have caused many members of Plaintiff tribes to discontinue such fishing activities at several of their usual and accustomed fishing places.* [citations to record omitted.]

384 F.Supp. 358 Joint App. 115 (emphasis added).[113]

113. Numerous other inferences and implications in the State's brief misconstrue or go beyond actual findings of the Court. Compare Washington's implication that fish "had been" a major food supply for Indians (State Br. 28) with the actual wording of FF 4 to the effect that the major food sources for the Indians "were" fish, etc. (FF 4, 384 F. Supp. at 350, Joint App. 100).

Compare the State's assertion that food preservation techniques were inadequate, (State Br. 28) citing FF 8 which deals with *non-Indian* preservation techniques, with FF 5, 384 F. Supp. at 351, Joint App. 101, where the Court held that "adequate Indian food preservation techniques had been developed by the time of the treaties and fish were able to be stored for use throughout the year and transported over great distances."

Compare the State's assertion (State Br. 32) citing FF 20 that "*The* Indians' primary concern was that they have freedom to move about to gather food, particularly fish, at their usual and accustomed fishing places" with the actual text of FF 20 that ". . . [A] primary concern of the Indians whose way of life was so heavily dependent upon harvesting of anadromous fish, was that they have freedom to move about to gather food, particularly salmon . . . at their usual and accustomed places." 384 F. Supp. at 355, Joint App. 109 (emphasis added). Note in addition to changing "a" to "the" the State in its argument has changed the whole emphasis from "harvesting fish" to "moving about".

Compare the State's language that Chinook jargon was "a trade medium used by the tribes" (State's Br. p. 34) and implying that it was widely understood by the tribes with the text of FF 22 which makes it clear that Chinook jargon was a "trade medium of limited vocabulary and simple grammar, . . . inadequate to express precisely the legal effects of the treaties, ..." and that "Many of those present, however, did not understand Chinook jargon." FF 22, 384 F. Supp. at 355, Joint App., 110.

Compare the State's assertion (State Br. 35) that "At treaty times Indians and settlers shared common fishing grounds, ..." citing FF 13 with the text of FF 13 which makes no mention of sharing grounds with settlers, but discusses the difficulty of compiling a complete inventory of usual and accustomed grounds and stations at this time because of subsequent events. (FF 13, 384 F. Supp. at 353, Joint App. 104.)

In addition to frustrating Indian livelihood, the shift to a marine fishery reduced the efficiency of the non-Indian fishing effort. As early as 1915, the Fish Commissioner recognized that purse seine fishing resulted in a harvest of small, immature fish at higher cost per fish than other methods. During the First World War, motorized trolling boats began operating on the high seas in front of both purse seines and other nets; these were even less efficient than purse seiners.[114] High salmon prices during and following World War I attracted even more boats into the marine fishery, and the harvest at trap sites decreased further as a result.[115]

Troll boats catch significant numbers of Puget Sound origin salmon in the ocean, which is "a vast mixing area for salmon from literally hundreds of diverse streams."[116] Harvest of an abundant run there has incidental effects on other runs which are present and may need protection.[117] Furthermore, trolling is expensive because the fisherman searches for and pursues the fish. He can protect his investment only by capturing all fish possible, regardless of their size or conservation requirements.[118]

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114. 24-25 *Commissioner's Report* 14-15, 35 (1914-1915); 28-29 *Commissioner's Report* 3-6, 9-10 (1917-1919); 30-31 *Commissioner's Report* 38-76 (1919-1921).

115. R. Barsh, note 81, *supra* at 14. The Washington Fish Commissioner reported, "It is safe to say that the capacity of the appliances for the taking of fish in 1913 was at least twice, if not four times, as great as 12 years previous." 24-25 *Commissioner's Report* 7-9 (1913-1915). The rapid growth of fishing effort, spurred on by high prices, also persistently threatened preservation of the fish runs. Fish Commissioner Darwin noted that the growing number of motorized purse seines and trollers "will materially assist in the depletion or complete destruction of the industry within a comparatively few years." 28-29 *Commissioner's Report* 10 (1917-1919).

116. Ex. JX-2a, Joint App. 343, 346.

117. *See* State's Br. 17-18, *cf.* FF 202, 384 F. Supp. 390, Joint App. 173.

118. R. Barsh, note 81 *supra* at 2-4.

The traditional Indian tribal fisheries, on the other hand, were highly efficient ones.[119] The bays, channels, and falls where Indians trapped and netted were not only highly productive locations, they also yielded fish which were at the end of their life cycle and therefore at maximum size. When they reach their natal streams, distinct salmon runs usually separate from one another. The Indian harvest methods therefore had the additional virtue of allowing easy identification and conservation of weak runs.[120]

Throughout the 1920's the Washington fishery suffered setbacks. Some people pointed to the increasing man-made damage to fish migration and spawning areas.[121] Environmental damage, in the form of contamination of rivers, erection of dams, excessive water diversion and state-permitted gravel removal and logging operations, was then, and is now, a very serious problem.[122] Many Indian tribal

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119. Ex. USA-20, Joint App. 394.

120. Washington's statement, State Br. 23, that major freshwater harvests as fish "approach spawning" diminish potential market values is not to the contrary, although it is a gross generalization. Fall chinook salmon, for example, deteriorate within a few weeks after they reach rivers. Coho and spring chinook salmon remain in highly marketable condition through long migrations up rivers. Transcript April 5, 1978, at 261-62. As the Court found, maximum profit is obtained "when the available 'crop' has obtained maximum bulk and quality. . . . when the fish are full grown and returning to or entering their natal stream." FF 172, 384 F. Supp. at 384, Joint App. 163. The tribal fisheries harvest at this point of maximum profitability and more than offset any loss of quality on highly perishable runs by minimizing search and capture costs. R. Barsh, *supra*, at 9-10. Price per pound is, of course, a product of supply and demand laws at any point in time.

121. Ex. MLQ-1 at 24-25.

122. The Washington Department of Fisheries has reported that extensive loss of salmon spawning habitat caused by contamination or destruction of spawning beds has resulted in a serious decline or elimination of many stocks of fish in the State. State of Wash., *1973 Annual Report, Natural Resources and Recreational Agencies* 20, *See*, State of Washington, Department of Fisheries, *A Catalogue of Washington Streams and Salmon Utilization*, Vol I, Puget Sound Introduction–01 (1975).

fishing places were destroyed in such fashion.[123]

During the mid-1920's, the number of fishermen increased faster than both the catch of salmon and salmon prices. Per capita income among commercial fishermen decreased. Thus began political battles among gillnetters, trollers, purse seiners, trap owners and sport fishermen, trying to secure for themselves a larger pieces of a shrinking pie.[124] Such problems were exacerbated by the State's then very limited knowledge of salmon biology and limited statistical base. It is now recognized that reliable fisheries statistics for Washington State date from about 1935.[125]

Before the 1930's, State officials probably had only a dim idea of how damaging the growing marine fishery was. The State Fisheries Board knew little of salmon biology and lacked funds for scientific work. (Ex. MLQ-1 at 25.) Serious research only became possible during the Great Depression. Under the administration of Fisheries Director B. N. Brennan, the Minter Creek biological station was built. Research done there quickly proved the inefficiency of the State's existing hatchery systems and convinced experts that artificially-propagated fish must be reared in hatchery ponds for a much longer period than it had been formerly believed necessary.[126] The belief that hatcheries

123. For example, the Duwamish River system in Western Washington, was largely destroyed. A canal was constructed linking Lake Washington to Puget Sound, lowering the level of the lake nine feet. The Black River dried up as the salmon returned to spawn in 1916. The White River was changed from a tributary of the Duwamish River to that of the Puyallup River in 1906. A large number of productive Muckleshoot, Duwamish, and Snoqualmie fishing sites were eliminated. Ex. USA-27(b) at 9-12, 13-16; *see* Ex. USA 102, 103.

124. Ex. MLQ-1 at 26.

125. *Annual Bulletin*, Wash. Dept. of Fisheries, No. 40 (Dec. 1940).

126. E. Salo and W. Bayliff, *Artificial and Natural Production of Silver Salmon, Onchorhynchus kisutch, at Minter Creek, Wash.*, Wash. Dept. of Fisheries Research Bulletin No. 4 (1958).

were a panacea for the fisheries was undermined, although it retained its currency.

In 1925 the state legislature declared that steelhead trout, upon reaching fresh waters, were "game" fish and could not be captured with nets.[127] Prior to that time, steelhead had not been distinguished from other salmonids.[128] For two years the law contained an exception for steelhead caught in streams within or bordering Indian reservations, but this narrow exception for Indian fisheries was eliminated in 1927. In 1929 the legislature prohibited the sale of steelhead trout in fresh fish markets.[129] This allocation of an entire species to hook and line fisheries, a response to political pressure from sports groups, imposed a particular hardship upon Indian tribes and their members. Steelhead are available for harvest primarily during the winter months, and have traditionally been a crucial source of winter food and income for Indians.

To make matters worse, in 1933 sport fishing interests successfully sponsored Initiative 62, which established a separate Game Department vested with regulatory authority over the steelhead trout. This department was structured to serve a single group, the sportsmen. Funded primarily by license fees and federal grants, it has functioned as an almost autonomous agency. The Game Department soon became the most aggressive opponent of Indian fishing.

In 1935, Washington voters adopted an initiative measure prohibiting the use of all "fixed gear."[130] Initiative 77

127. *Wash. Laws*, Ex. Sess. Ch. 178 (1925).

128. *See* FF 168, 384 F. Supp. at 383, Joint App. 161-62.

129. Ex. JX-2a at 63.

130. The Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association [hereinafter Association] advert to this, Associa-

described a line inside of which Puget Sound was closed to commercial fishing except gillnetting and trolling during most of the year and during certain portions of the week.

Catch data show that Initiative 77 reallocated the previous harvest of the trap fishery to trollers, gillnetters, and purse seiners, in that order of priority.[131] In effect, each non-trap user group was rewarded in direct proportion to its relative inefficiency.[132] Initiative 77 thus reflects a regulatory philosophy of legally enforced inefficiency, accompanied by displacement of Indian tribes from a dominant position in the industry.

Passage of Initiative 77 solved little. The reallocation of salmon catches simply atracted new fishermen. Capital freed by the elimination of fish traps was promptly reinvested in marine gear.[133] "Because of their greater ability to take fish," Commissioner Darwin explained of the trapmen, "prejudice has naturally been aroused against them. But the use of the purse seine . . . stole upon us like a thief in the night."[134]

By its terms, Initiative 77 did not apply to Indians fish-

tions' Br. at 46, n. 32, and castigate the District Court because of a tribe's use of a fish trap in Puget Sound. They fail to point out that the trap in issue is only a research device. Fish are impounded, weighed, tagged and released by professional biologists. Transcript April 5, 1978 at 306. There is no evidence that a properly regulated trap fishery is inconsistent with conservation of fish runs.

131. R. Barsh, n. 81 *supra*, at 25.

132. *Id.* Professor Barsh demonstrates that the total fishing income, divided in this fashion, is far less than the maximum realizable on the resource. Harvesting the fish with motorized trollers and purse seines imposes on the consumer the higher costs of operating that fishing gear, the increased administrative cost of regulation, the losses due to killing the fish before they reach maximum size, and the indirect effects due to overharvesting weak runs which are mixed, in marine areas, with harvestable runs of other streams. *Id.* at 10.

133. R. Barsh, *supra*, at 15-16.

134. 28-29 *Commissioner's Report* 10 (1917-1919).

ing "under federal regulations," but from the very first there was uncertainty whether Indians could continue to use traditional fish weirs, traps and set nets. Both the State and white citizens attempted to prevent Indian trapping and netting. Finally, when the fisheries laws were recodified in 1949, the exemption for Indians was eliminated.[135]

D. The Struggle for Recognition of Indian Fisheries

Despite their long exclusion from meaningful participation in Washington commercial fisheries, members of the treaty Indian tribes have continued to fish in the contemporary era. Fishing "still provides an important part of their livelihood, subsistence and cultural identity."[136] It provides "a cohesive force in Indian society."[137] Thus the State of Washington's continued closure of rivers and streams posed a very heavy restraint on the Indian way of life. Many Indians fought these restraints.

In 1939 State officers, believing that Indian fishing was subject to their control, arrested a Yakima Indian named Sampson Tulee. Tulee was tried and convicted of netting and selling salmon without having obtained a license to fish as required by a 1937 law. He unsuccessfully sought habeas corpus relief from the federal courts, was retried, and his conviction was upheld by the state Supreme Court.[138] The Supreme Court of the United States reversed, stating:

> [W]e are impressed by the strong desire the Indians

135. *Wash. Sess. Laws*, Ch. 112, Sec. 31 (1949). There is no legislative history for this change and it appears to have originated with the code reviser rather than with the legislature.

136. FF 31, 384 F. Supp. at 357-58, Joint App. 113-14.

137. Ex. USA-20, Joint App. 394.

138. *State v. Tulee*, 7 Wn.2d 124, 109 P.2d 280 (1941). The Court relied on *State v. Towessnute*, *supra*, and two later cases which rejected

> had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in the spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.[139]

In 1950 the Makah Tribe sued Washington's Director of Fisheries over the State ban on Indian net fisheries during the Hoko River coho salmon run.[140] The District Court dismissed the Tribe's complaint, but the Court of Appeals reversed because the State had not shown that closure of the river was necessary for conservation. Although sport fisheries on the river were permitted, the State had refused to permit Indian net fisheries on the ground that the cost of patrolling to enforce closures was too great. The Court of Appeals labeled the State's contention "absurd" and went on to hold

> that where a treaty gives the Indians a right to fish, the state cannot deny that right because of the cost of preventing their taking of fish in excess of that right.[141]

Similar litigation began in Oregon, but this time the state's "conservation" arguments were more carefully advanced. The Ninth Circuit Court of Appeals ruled that the State had not shown that its regulations prohibiting commercial salmon fishing on Columbia and Snake River tributaries were necessary for conservation.[142] Testimony of

the Indian treaty right defense. *State v. Meninock*, 115 Wash. 526, 197 P. 641 (1921) and *State v. Wallahee*, 143 Wash. 117, 255 P. 94 (1927).

139. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

140. *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

141. *Id.* at 225.

142. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir.) *cert. denied*, 375 U.S. 829 (1963); *see also Holcomb v. Confederated Tribes of the Umatilla Reservation*, 382 F.2d 1013 (9th Cir. 1967).

Oregon Game Commission officials showed that "conservation" was only a label for regulations which sought to protect commercial and sports fisheries. The regulations were promulgated with "no regard for the welfare of Indians," the Court found, since they allowed all the harvest to be taken by non-treaty commercial fisheries in the lower part of the river or by sportsmen on the tributaries. Conservation measures needed to protect the runs could have been taken without restricting the Indian fisheries. In *Maison* for the first time, a court had examined the overall pattern of state regulation of anadromous fisheries and found that in practice by "conservation" the State meant reserving catches for non-Indian sport and commercial fisheries.

Controversy over fishing rights continued to generate tension between sportsmen and treaty tribes during the 1960's. There was violent unrest among non-Indians which prompted the Department of Game to reinstitute enforcement of regulations prohibiting Indian net fishing for steelhead on the Puyallup River, notwithstanding the decision of the state Supreme Court in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957). More Indian tribal fishermen were arrested.[143] Later, the state court flatly rejected the treaty right defense.[144] Numerous prosecutions of Indian fishermen followed.[145]

In December 1966, the Washington Supreme Court

143. FPTO, Sec. 3-480, Record in 9th Circuit Cause No. 74-2414, R. 830.

144. *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 943 (1963).

145. In the 1960's, Indians engaged in "fish in" civil disobedience on the Nisqually River. In 1964, the Washington Congressional delegation introduced S.J.Res. 170 (to apply state regulation to off-reservation fishing) and S.J.Res. 171 (to extinguish, by purchase, off-reservation rights). After extensive hearings (*see, e.g.*, Hearings on S.J.Res. 170 and S.J.Res. 171, Sub. Comm. on Indian Affairs of the Senate Com. on Interior and Insular Affairs, 88 Cong., 2d Sess. 50-61; 76-84; 100, 104), the bills died in Committee.

decided *Department of Game v. Puyallup Tribe*.[146] The State had urged that the tribe was defunct, that its members were without rights under a treaty, and that the treaty itself was but a scrap of paper entered into without consideration from "a conquered people without right or title to anything."[147] The court chastised the Game and Fisheries Departments for arguing what has been called the "menagerie" theory of Indian title

> that Indians are less than human and that their relation to their lands is not the human relation of ownership, but rather something similar to the relation that animals bear to areas in which they may be temporarily confined.[148]

Nevertheless, the state Supreme Court concluded that regulations reasonable and necessary to conservation of fish could be applied to treaty fisheries.[149]

Sohappy v. Smith, 302 F.Supp. 899 (D.Or. 1969), greatly illuminated the crucial question whether State regulations which allocate all the harvest to non-treaty fisheries, and thereby create a conservation problem once fish get to the rivers, are "necessary for conservation." The court there examined the conflict between Indian tribal fisheries and the State of Oregon which had resulted from Oregon's 1901 closure of most of the Columbia River to fishing except by hook-and-line. The State argued that the "in common" language of the treaties required only that each

146. *Dept. of Game v. Puyallup Tribe*, 70 Wn.2d 245, 422 P.2d 754 (1967).
147. *Id.*, at 249, 422 P.2d at 756.
148. *Id.*, at 249, n. 3, 422 P.2d at 757.
149. This conclusion was affirmed by the United States Supreme Court, *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). The Court ruled that the power of the State was to be measured by whether state action was "necessary for the conservation of fish," citing *Tulee v. Washington*, 315 U.S. 681, 684 (1942). The Court also pointed out that the right to fish outside the reservation was a treaty right that could not be qualified or conditioned by the State and that the treaty imposed greater restriction on state power than did the United States Constitution. *Puyallup I*, 391 U.S. at 401, n. 14.

regulation be equally applicable to Indian and non-Indian fishermen. This argument, the court concluded, would only be plausible "if all history, anthropology, biology, prior case law, and the intention of the parties to the treaty were to be ignored."[150]

The court found that Oregon's so-called "conservation" policies were concerned with allocation and use of the fish resources as well as with their perpetuation. State authority had been divided between two agencies, one concerned with the protection and promotion of fisheries for sportsmen and the other with protection and promotion of commercial fisheries. The testimony of the State's witnesses showed that by use of definitions, licensing, regulation of gear, and agreements, the State was allocating salmon and steelhead between commercial and sport fishermen. The State had given no consideration to the treaty rights of Indians as an interest to be recognized or a fishery to be promoted in the State's regulatory and developmental program. Its harvest plan effectively zoned the Indians out of the fishery; for all the fish harvest was taken before the runs reached most Indian usual and accustomed fishing places. Application of the regulatory scheme to treaty fisheries was not, therefore, necessary for the conservation of fish. Judge Belloni reasoned that the United States Supreme Court in *Puyallup I*,

> was undoubtedly speaking of conservation in the sense of perpetuation or improvement of the size and reliability of the fish runs. It was not endorsing any particular state management program which is based not only upon that factor but also on allocation of fish among particular user groups or harvest areas or classification of fish to particular uses or modes of taking.[151]

150. 302 F. Supp. at 905.
151. *Id.* at 908.

The Court concluded:

> If Oregon intends to maintain a separate status of commercial and sport fisheries, it is obvious a third must be added, the Indian fishery. The treaty Indians, having an absolute right to that fishery are entitled to a fair share of the fish produced by the Columbia River system.[152]

In Puget Sound, the overall management problems and the difficulties associated with the dispute between the tribes and the State were complicated by a dramatic increase in the number of non-treaty fishermen. Between 1965 and 1974, the State-licensed gillnet fleet in Puget Sound more than doubled; in Grays Harbor it more than tripled; and 1665 new troll fishermen joined the chase for Washington salmon.[153] Washington took no steps to limit the number of commercial fishermen until 1974.[154]

152. *Id.* at 911.

153.

Gillnet licenses	*Puget Sound*	*Grays Harbor*	*Troll*
1965	907	105	1833
1974	1989	338	3487

J. Mundt, *Report to the Regional Task Force Concerning Catch, Licensing, Gear Reduction and Allocable Fishing Time History for Washington Salmon Fisheries*, 1965-77, Ex. 13 (1978). In light of the huge increase in licenses, the State's report of the average experience of non-Indian fishermen, State Brief at 8, is difficult to believe. Scholars had already pointed out that State regulations had actually *attracted more fishermen* into the industry, which resulted in a vicious cycle of increasing numbers of fishermen, increasingly restrictive gear limitations, and increasing prices. R. Barsh, note 103, *supra*, at 5. Professor Brown's analysis of the industry created under State regulation is similar. He concludes:

> The most striking fact is that during the decade of the 1960's, only purse seining made any money in an economic sense. After expenditures for repairs, gear and labor, etc., there was no money left over to pay a return on capital invested in boats for the troll and gillnet fishermen and only $38,000 was available to the estimated 116 purse seining units as a return on investment, despite the fact that their total revenue was about 3.5 million dollars. : : :
>
> The net revenue per pound of all non-Indian gear is *zero*. : : :
>
> In short, the Puget Sound fishery, as it has been managed for the past 10 years, is an uneconomic enterprise producing an overall economic loss to the economy of the State of Washington.

Ex. MS-1 at 6-15.

154. RCW 75.28.150, *et seq.*

E. Filing and Trial of United States v. Washington

The decision in *Sohappy v. Smith*, marked significant progress in accommodating the interests of treaty and non-treaty fisheries. No party appealed the decision. The Columbia River example gave hope to Indian tribes and responsible government officials alike that a solution to the Washington fishing rights controversy could be reached.[155] Unfortunately, members of the thirty treaty Indian tribes of Western Washington continued to suffer arrests and seizures of property for alleged violations of State regulations. The most serious conflicts involved the Washington Department of Game and steelhead trout.[156]

The Game Department asserted that the treaties did not grant Indian tribes any privileges or immunities greater than those held by non-Indian citizens.[157] The Director of Game testified at trial that it would be an abdication of his responsibilities to allow any off-reservation Indian net fishing for steelhead absent court compulsion.[158] In addition, the Game Department successfully lobbied the Wash-

155. The administrative assistant to Washington Governor Dan Evans declared:

> I can state categorically that the state of Washington will be guided by the wording and spirit of the Belloni decision. Governor Evans, the director of game, and director of fisheries have met together and this is to be the policy of the state.

James Dolliver, quoted in American Friends Service Committee, *Uncommon Controversy* 200 (1970).

156. Steelhead, a species indigenous to the Pacific Northwest, had traditionally been harvested and relied upon by tribes as a major part of their diet and trade during the winter months. Until 1925, steelhead were not distinguished from other salmonid species, but since that time, they have been set aside entirely for the hook and line sport fishery. See note 127-29 and accompanying text, *supra*.

157. FF 333, 384 F. Supp. at 394, Joint App. 181.

158. FF 319, 384 F. Supp. at 393, Joint App. 180.

ington Legislature and the public to maintain sport sanctuaries for steelhead.[159] In short, the Game Department gave no consideration to treaty fishing rights in its regulatory, management, and propagation program.[160]

Although the Game Department was party to some of the civil and criminal litigation in the State courts, it paid little regard to the decisions. After the decision of the United States Supreme Court in *Puyallup I*[161] the Department's suit against the Puyallup Tribe was remanded for trial in state Superior Court. On appeal in 1972, the Washington state Supreme Court held:

> [I]t is incumbent upon the Department of Game to provide, annually, regulations for a Puyallup Indian net fishery of steelhead when it is determined by the department, upon supporting facts and data, that an Indian net fishery would not be inconsistent with the necessary conservation of the steelhead fishery.[162]

Nevertheless the Department of Game continued to take the position that State enactments prohibiting commercial and net fisheries for steelhead were binding on treaty Indians at usual and accustomed places without a showing that the regulations were reasonable and necessary for conservation.[163]

In light of the pattern of State regulatory discrimination and non-treaty preemption of the resource which had developed, the United States, on behalf of itself and seven

159. FPTO, ¶3-428, 3-431, 3-436, Record in 9th Circuit Cause No. 74-2414, R. 812-13, 815; Ex. USA-42; Ex. G-14 at 10; Record in 9th Circuit Cause No. 74-2414, Tr. 313, 331-332, 263, 288-89, 304-05.

160. FPTO ¶3-486, Record in 9th Circuit Cause No. 74-2414, R. 831.

161. *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968).

162. *Department of Game v. Puyallup Tribe*, 80 Wn.2d 561, 571, 497 P.2d 171, 178 (1972).

163. FPTO, ¶3-485, Record in 9th Circuit Cause No. 74-2414, R. 831; FF 225, 226, 229-232, 384 F. Supp. at 395-96, Joint App. 183-86.

Indian tribal governments, filed an action against the State in September, 1970. This was *United States v. Washington*, Civil No. 9213.

Three years of pretrial proceedings followed the filing. Detailed anthropological reports were prepared covering the identity, treaty status, usual and accustomed fishing places, and governments of each of the affected Indian tribes. On August 24, 1973, an extensive Final Pre-Trial Order was filed.[164] Shortly thereafter trial commenced before the Honorable George H. Boldt.

None of the petitioner non-Indian fishing associations sought intervention before or during the trial.[165] However, the Departments of Fisheries and Game intervened and participated as separate parties from the State of Washington.

The District Court found that at the time of trial only a few tribes were still active in saltwater fisheries at their usual and accustomed places, explaining that:

> Enforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians.[166]

Testimony of many Indian witnesses described the effects

164. Docket No. 353, Record in 9th Circuit Cause No. 74-2414, R. 759.

165. The Purse Seine Vessel Ass'n. filed a memorandum in support of the State's motion for summary judgment *amicus curiae*, Docket No. 172, Record in 9th Circuit Cause No. 74-2414, R. 291, and, much later in the litigation, moved to intervene, Docket No. 495. Shortly afterwards, on May 31, 1974, the petitioner Commercial Passenger Vessel Ass'n. also moved to intervene, Docket No. 571-72. These motions were denied, and neither party appealed.

166. FF 193, 384 F. Supp. at 388, Joint App. 170.

of severe state enforcement and harassment. These witnesses recounted not only the bitter experiences of their elders, but also their own personal treatment in derogation of their treaty rights. One tribal witness stated, "the Indian fisherman has been driven out of the economy" and the State of Washington has undertaken to close down the entire Indian fishing business.[167] Mrs. Lena Smith, a Stillaguamish, recounted how members of her tribe stopped fishing because they were afraid of imprisonment and that, as a consequence, they lost their ambition to fish.[168]

Mr. Bill Frank, Jr., a Nisqually, testified that his fishing gear had been confiscated several years ago and was still being held by the Department of Game.[169] He also recalled that the Department of Game tore nets out of the river with grappling hooks and used knives to cut nets to remove them.[170] In addition, the State had taken boats and motors from him.[171] Mr. Frank explained that he had never been notified of any judicial proceedings in which any of the seized property had been declared confiscated or forfeited.[172]

Mr. Forrest Kinley, unqualifiedly told of how the State has dealt with Indians claiming treaty fishing rights:

> I think that the State of Washington has deprived our people of a livelihood through harassment and restrictions in our accustomed fishing grounds to where that we could not compete with non-Indians in commercial fisheries.
>
> There was no financing, no nothing for us. I think that our way of fishing in the rivers—you just take a good look at the State of Washington. On every river that we tried to reserve these rivers for our people, we have been harassed. We have been fished out in front.
>
> There has been overfisheries in front of every one of these rivers. This type of harassment has gone on all through my life.[173]

Simply stated, the evidence showed that state fishing regulations had been catastrophic to Indian well-being; they had seriously hampered pursuit of the traditional Indian way of life.[174] As Dr. Lane indicated in her anthropological report, "laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen."[175]

The State agencies took positions different from each other and different from the present position of the State. The continuing purpose of the Department of Game was to maximize recreational experience for sport fishermen only.[176] The Game Department claimed inability to authorize the Indian off-reservation net fishing because of a lack of information with which to predict harvest effort and run size. Yet evidence revealed that the Department of Game contacted neither the Bureau of Indian Affairs nor more than two of the Indian tribes for such information.[177] Furthermore, the Department failed to advise the Washington State Game Commission and the legislature of the

167. Record in 9th Circuit Cause No. 74-2414, Tr. 3053, 3066-67; *see* Ex. MS-7, at 3; Ex. MS-3, at 2; Ex. MS-8, at 2; Tr. 2522; Mr. Calvin Peters, a Squaxin, told how the State has harassed his people and said, "I think it would be fair to say that a lot of Indians feel now that rather than have to go through this type of harassment, they don't ever go fishing in what we consider our usual and accustomed way." Ex. MS-2, at 4.

168. Record in 9th Circuit Cause No. 74-2414, Tr. 2704.

169. *Id.* at Tr. 2629.

170. *Id.* at Tr. 2630.

171. *Id.* at Tr. 2631.

172. *Id.* at Tr. 2628. Indeed the Game Department admitted at trial that no court action to declare a forfeiture had ever been initiated. Joint App. 258.

173. *Id.* at Tr. 3068-69.

174. *See e.g. Id.* at Tr. 3194, 3198, 3252, 3269, Ex. MS-10 at 3.

175. Ex. USA-20, Joint App. 393.

176. FPTO §3-428, Record in 9th Circuit Cause No. 74-2414, R. 812.

177. Ex. USA-14, Record in 9th Circuit Cause No. 74-2414, Tr. 430-38.

information which it had in its files. Instead, the Department simply estimated what it thought the tribes would want and recommended that such a fishery be barred because of lack of information.[178]

The Department of Fisheries was somewhat more accommodating. It believed that the best standard for achieving equitable regulation of treaty Indian fishing was to provide an opportunity for the tribes to take a "fair percentage of the harvestable fish."[179] Fisheries acknowledged that the *Puyallup* decisions required the State to give treaty Indians an equitable opportunity to take a portion of the salmon runs at usual and accustomed places, since the treaty right would be an empty one if there were no fish for the Indians to harvest at those places, consistent with preservation of the resource.[180] The Department of Fisheries promulgated several special regulations which permitted Indian fishing at some usual and accustomed places.[181] Those regulations, however, benefitted only seven of the tribes in Western Washington.[182]

Prior to trial, the Department of Fisheries concluded that the practicalities of regulation required a more specific allocation. The Department requested the court to "quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon

178. FPTO, §3-440, Record in 9th Circuit Cause No. 74-2414, R. 816-17; *Id.*, Tr. 538-39, 553-56; Ex. JX-2(a) 238; PL-37; PL-78; G-18.

179. FPTO, §3-586, Record in 9th Circuit Cause No. 74-2414, R. 836.

180. *Id.*, FPTO, §3-598, R. 840.

181. FF 209, 384 F. Supp. at 391, Joint App. 175-76. As a member of the International Pacific Salmon Fisheries Commission, the Director of Fisheries also attempted to obtain Canadian agreement to a greater number of fishing days for the Makah Tribe, and when the Canadians refused, the Director took unilateral action to provide more days. FF 216, 384 F. Supp. at 393, Joint App. 179.

182. FF 209, 384 F. Supp. at 391, Joint App. 175-76.

which originate in and return to waters of the State of Washington in the case area."[183] In its Post Trial Brief[184] and in argument in the District Court, Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the tribes.[185]

After hearing the evidence and considering proposed finding of facts and conclusions of law submitted by all parties, the District Court rendered Final Decision No. 1 on February 12, 1974, *United States v. Washington*, 384 F. Supp. 312, Joint App. 63. The court found there was no "equal opportunity fishery"[186] but that Washington's regulatory scheme discriminated against the treaty fishing right:

> The application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the reasons that, a) they have not been established to be necessary to preserve and maintain the resource; b) they operate to discriminate against the tribes' treaty right to fish; c) they have been adopted and enforced in violation of appropriate standards; and, d) they have been adopted and enforced in derogation of the meaning and purposes of the treaty provision at issue in this case.[187]

Washington statutes and regulations, the court found, had *totally closed* many of the tribal usual and accustomed fishing areas to all net fishing, "while permitting commer-

183. Fisheries Pretrial Brief (Docket No. 348) at 8, 22, Record in 9th Circuit Cause No. 74-2414, R. 734, 748; *see also id.* at 2, R. 728.

184. *Post-trial Brief of Fisheries* (Docket No. 399) at 36, *Id.* at R. 1375.

185. *Id.*, Tr. 4384. It is remarkable that the State's Brief entirely omits the pre-trial order and trial proceedings in its latest discussion of whether an allocation is necessary. Washington's views on fishery management objectives seem to have changed as well, compare FF 198, 384 F. Supp. at 389, Joint App. 172 with State Br. at 100.

186. Washington's statement that state regulations "are inherently nondiscriminatory" (State Br. 61) is incorrect. *Cf.* State Br. 81, 90, 101, 29, 35.

187. CL 38, 384 F. Supp. at 403, Joint App. 199.

cial net fishing for salmon elsewhere on the same runs of fish".[188] Even where tribal fishing was still permitted, the right was severely limited. Department of Fisheries regulations often allowed

> all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places.[189]

Evidence at trial showed that of the total salmon harvested in areas shown to be included in the tribes' usual and accustomed off-reservation fishing places, Indian fisheries took only 5% of the harvest.[190] The State admitted that it had authority to regulate non-treaty fisheries in order to increase the size of salmon runs through the usual and accustomed fishing places of the tribes.[191]

The Court also found that, in violation of their regulations, both the Department of Game and the Department of Fisheries had seized nets, confiscated fish, and retained valuable Indian property for long periods of time without notice, and without judicial proceedings.[192] Finally, despite the long history of State attacks on Indian fisheries under the guise of conservation, the court found no significant evidence that the charges were true:

> With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.
>
> Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.[193]

188. FF 218, 384 F. Supp. at 393 Joint App. 180.

189. FF 217, 384 F. Supp. at 393, Joint App. 179-180.

190. Ex. PL-74. Even on isolated rivers all Indian fisheries (both on and off reservation) took at most only 24% of the harvest, (according to State technicians.) Ex. PL-74; F-6; F-26; Record in 9th Circuit Cause No. 74-2414, Tr. 4082-83.

191. FF 204, 384 F. Supp. at 390, Joint App. 174.

192. FF 194-95, 384 F. Supp. at 388, Joint App. 170-71.

193. 384 F. Supp. at 338-39 n. 26, Joint App. 81. Since the decision, the tribes admit that despite their best efforts, they have occasionally erred on fisheries management questions. On occasion tribes have refused to accept State representations as to the need for a conservation closure only to be proven wrong. For example: during the 1975 chum run, on motions by the tribes, the Court found that substantial non-treaty fishing had denied the tribes an opportunity to take their share of preceding runs. Joint App. 450-51. On October 27, 1975 the Court enjoined further non-treaty fishing until the tribal harvest reached 60,000 fish. Two days later the State exercised emergency conservation authority and halted all fishing. *See* Docket No. 1562. This obviously appeared to be a ploy by the State to stop treaty fishing and in the confusion which followed several tribal fisheries continued until tribal biologists could be assured that the State was not simply trying to deprive the tribes of the fishing opportunity just awarded them. There have been other instances where the State has sought and obtained closures of tribal fisheries because of tribal refusal to accept State representations concerning conservation or disputes over preemptive interceptions or allocations. (*See, e.g.,* Joint App. 471-74, Closure of Nooksack River to Lummi tribal fishing.) It should be noted that in all cases the Court has held prompt hearings on these matters.

These refusals to accept state representations understandably arise because of the well-documented history of State discrimination in the case and continuing questionable practices of the State. *See,* for example, the 1977 episode in which the State unilaterally began enforcing laws against treaty fishing in Lake Washington and had to be "corrected" by the Court. (Joint App. 476-78) Such actions in the past did not engender tribal confidence in the State Department of Fisheries and have led to continuing disputes over the true need for closures of tribal fisheries.

Additionally, tribal fisheries departments have sometimes failed to completely comply with technical requirements of Court orders calling for timely filing of tribal regulations, etc. (*See* Wash. Dept. Fisheries, *Technical Report* 40, 1978.) As tribal governments are able to secure more staff support and as working relations improve between State and tribal technical staffs, these instances appear to be declining. *Id.* at 4; *see* discussion of cooperation through the Fisheries Advisory Board in §IV, *infra.*

The evidence clearly established that the salmon available for harvest by Washington fisheries are not sufficient to meet all demands. Therefore, fishing activities of Indians and non-Indians have to be regulated in order to assure perpetuation of the fishery resource.[194] The District Court saw its task to be to devise a remedy which would accommodate the rights of the parties within the limitation of conservation requirements. The Department of Game urged that no harvest allocation be made. The Department of Fisheries, as previously mentioned, asked that the tribes be allocated a fixed percentage of the harvest. The tribes, on the other hand, argued that the treaties were intended to preserve the Indian livelihood in an amount sufficient to satisfy their needs, an analogy to reserved water rights in *Arizona v. California*, 373 U.S. 546 (1962).[195] Evidence presented showed that the profits of an 80% share of the harvest of major Puget Sound and Washington coastal river systems would support only 831 Indian families under ideal circumstances.[196] A 40% allocation could support only 390 families at a level of five thousand dollars ($5,000) per family per year.[197]

Faced with these arguments, the District Court declared that non-treaty fishermen and treaty Indian fishermen, should each collectively be given an opportunity to harvest up to 50% of the resource which normally would return to tribal fishing grounds (after deducting fish actually caught on Indian reservations or used in the Indian diet

194. FF 181, 384 F. Supp. at 386, Joint App. 166.

195. *See e.g.*, Muckleshoot, et al., Pretrial Brief, (Docket No. 327), at 8-11, Record in 9th Circuit Cause No. 74-2414, R. 653-56.

196. Ex. MS-1, 30-32, Table 13. This computation assumes use of a highly efficient trap fishery.

197. *Id.*

or tribal ceremonies).[198] However, what appeared to be an equal sharing of fishing opportunity at tribal usual and accustomed fishing places turned out to be far less than 50% of the total Washington fisheries for the tribes.

The Court of Appeals' affirmance[199] and the District Court's post-decision rulings[200] excluded many of the fish runs from the equal sharing principle. First, of course, fish needed for conservation are not subject to sharing.[201] The allocation applies only to "harvestable" fish. Second, fish runs which do not originate from, or pass through the usual and accustomed fishing grounds of a treaty Indian tribe, are excluded.[202] Third, portions of a run which would not migrate back to tribal fishing grounds at maturity because of disease, injury or other causes, are excluded. This applies particularly to troll and sport fisheries because many of the fish caught by these groups are immature. Thus those fisheries catch "more" fish than are actually counted. The Court's apportionment only provides the tribes with an opportunity to take a share of fish "which, *absent harvest enroute, would be available* for harvest at the treaty tribes' usual and accustomed fishing places."[203] Fourth,

198. This is consistent with Dr. Riley's testimony that the United States negotiators "were trying to make sure that the citizens received their fair share of the fisheries. . . . In common with, if it means nothing else, must be taken to mean that." Record in 9th Circuit Cause No. 74-2414, Tr. 2385, Joint App. 299.

199. 520 F.2d 676, 688-90, Joint App. 52-53.

200. Order on Certain Questions, 1, 4, 5, 6, 7, 8, 10, Joint App. 457-60.

201. 384 F. Supp. at 343, Joint App. 88. "Adequate production escapement" is liberally defined, *see* 384 F. Supp. at 405, Joint App. 202. There is no substance to Washington's assertion, State Br. 104, that a disproportionate share of the burdens of conservation requirements is placed on non-treaty fisheries. *See* 384 F. Supp. at 411, Joint App. 213.

202. "The opportunity to harvest shall . . . be based upon the system of origin . . ." Order on Certain Questions 1, 4, April 13, 1976, Joint App. 457.

203. 384 F. Supp. at 344, Joint App. 90 (emphasis added).

fish harvested by United States citizens, but sold outside the State of Washington, are excluded.[204] Fifth, fish harvested by foreign fishermen in United States or other waters, are excluded.[205] Sixth, fish taken by the State of Washington at hatchery facilities for sales to processors or donations, are excluded.[206] These fish are subtracted from the total salmon production of Washington before the court's sharing formula comes into play. Three other small adjustments are made, to exclude fish harvested on Indian reservations[207] and fish used in tribal ceremonies or to feed tribal families.[208] Finally, treaty and non-treaty fisheries are each afforded the *opportunity* to take one-half of the remaining surplus of each fish run.

This is a matter of some importance in this appeal because of the prominence given by the State and the association in their briefs to the argument that the tribes have been allocated "50 plus" of the total catch of approximately eight million salmon. The actual workings of the District Court's allocation order as discussed briefly above, are discussed in more detail in Part III A of this brief. In addition, the brief of the United States contains a detailed description of the workings of the allocation order. In

204. Order on Certain Questions, 6, April 13, 1976, Joint App. 458.

205. *Id.*, 5, Joint App. 458.

206. *Id.*, 10(b), Joint App. 460.

207. Dr. Lane testified that Indian reservations referred to in the treaties often included some of the tribal traditional fishing grounds. As to those, "the understanding of all parties concerned was that no whites could go onto the reservation and use those facilities." Joint App. 270-71. In other words, the tribes granted the settlers no shared use rights at those locations. *Id.*

208. Non-treaty commercial fishermen are not required to record the fish they reserve from sale for gifts or home use, so these harvests are also deducted from the equal sharing process in practice. Preliminary Injunction Re Salmon Allocation for 1978, at 7 (August 11, 1978, Docket No. 4798).

1977, the tribes, for the first time obtained close to their treaty share—approximately 43% of the combined Puget Sound origin runs. This figure is calculated by comparing the combined tribal catches[209] shown on the tables at Joint App. 593, with the total non-treaty catch, composed of the commercial net catch, the Puget Sound sport catch, the ocean troll and ocean sport catch shown in the table at Joint App. 594. The total tribal catch, however, comprises only *18%* of the total Washington landings. This is demonstrated by an examination of Tables 1 through 5 of the Washington Salmon Harvest Statistics prepared by the Washington Department of Fisheries, Ex. PL-M-3, Joint App. 635-639. This result occurs because of the substantial non-treaty catch of stocks that do not originate in Puget Sound and because of the catch of immature fish which, as explained above, must be adjusted to adult equivalents in compliance with the District Court's allocation formula.

209. A related distortion, repeatedly mentioned by the State and the Associations, concerns the number of treaty fishermen. In FF 188, 384 F. Supp. at 387, Joint App. 169, the District Court found that the Department of Fisheries *estimated* that the total number of Indian sport and commercial fishermen *at the time the case was tried* was 794. The State and Associations repeatedly use this number to refer to the total number of treaty fishermen. However, as outlined above, the court made repeated findings that this number had been reduced because of State discrimination against treaty fishing. At the present time there are now well over 1,200 Indian commercial fishermen participating in the fishery. *See* Regional Team of Federal Task Force on Washington State Fisheries, *Settlement Plan for Washington State Salmon and Steelhead Fisheries*, at 284 (June 1978). (Note: On April 7, 1977, the President established an inter-agency "Task Force" to address problems associated with reactions to the District Court's decision. In June of 1978, the Regional Team of the Task Force proposed a "settlement plan". That plan has been essentially rejected by all parties.) The figures in the Task Force report indicate that the total number of units of Indian commercial gear is 1,217. However, the Report notes that some fishermen possess more than one unit of gear and that the total number of fishermen is correspondingly less. However, this is largely offset by the fact that the Task Force data does not include information from the following tribes concerning their fishermen: Duwamish, Snohomish, Snoqualmie and Samish. Nor does it mention that one piece of gear will often be fished by two or more related families. Accordingly, 1,200 is a *conservative* figure for the total number of Indian commercial fishermen now active in Western Washington.

Another very important distortion by the State in its brief concerns the impact of the decision on the State's conservation authority. The District Court carefully preserved State authority to regulate *all* fisheries for conservation. Notwithstanding some passages in its opinion which suggest that court or tribal approval is a prerequisite to State regulation of treaty fisheries, this applies only to State permanent regulations. Washington has never found it necessary to seek court approval of an off-reservation regulation because:

> Emergency regulations are enforceable by the State upon filing with the court and service upon the tribes affected. . . .[210]

The State had always governed the openings and closings of the fishery during the season essentially by emergency regulation. No judicial hearing or review is necessary before these conservation regulations can go into effect. This matter is discussed in some detail in Part IV of the Argument, *infra.*

F. Post Decision Remedies of the District Court

For a number of reasons, vindicating the tribal right to take a fair share of the fish has not been a simple task. Both the District Court and Court of Appeals found that Washington's regulations typically permit most, or all, available salmon to be harvested by non-treaty fishermen prior to their return to tribal fishing places, which are near the end of the salmon migration paths. Thus, a crucial part

210. 384 F. Supp. at 417, Joint App. 225. The Order for Program to Implement the Interim Plan, a key post-decision order, contains much the same language. October 8, 1974, Joint App. 439. These, perhaps the most important paragraphs of the lower court's rulings, directly contradict the State's (Br. 110) and the *amicus curiae* Institute of Fisheries Biologists' (Br. 24, 27) account of the effect of the court decision.

of the District Court's apportionment was the requirement that the State of Washington

> make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision, but . . . consistent with the concept of permitting the full harvest of fish.[211]

Tribes have no opportunity to catch one-half of the salmon runs which normally return to them unless one-half of the fish escape "downstream" fisheries. Or, as the Court of Appeals said, "preserving the tribal opportunity requires limiting the non-tribal opportunity."[212]

Within a few months of the District Court's decision, several non-Indian fishing associations attempted to intervene or brought lawsuits directly against the federal court.[213] The intervention motions were denied but all interested parties were invited to participate[214] as *amicus curiae,* and many did so.[215] Several Indian tribes intervened and presented evidence regarding their treaty status and

211. 384 F.Supp. at 420, §5, Joint App. 230.

212. 573 F.2d at 1130, App. A-13, Petition in No. 78-119.

213. *See Bergh v. Washington, et al.,* C74-524 S, *dismissed by memorandum order* (W.D.Wash. 1974), *aff'd.,* 535 F.2d 505 (9th Cir. 1976), *cert. denied,* 429 U.S. 921 (1976).

214. Interestingly the non-Indian fishing associations did not suggest then, nor do they now, the existence of any additional evidence relevant to the intent of the treaty parties or the nature of the tribal reserved harvesting right. The extravagant claims of economic injury, *see e.g.,* State Br. 7-8, were heavily discounted by the Governor's Fishing Gear Reduction Task Force. A lawyer on the Task Force said, "None of us presumed at any time that the sole source of the problem was the federal court decision, we all considered it a contributing force and I think the forces have been drawn up [sic] as early as 1962, in the economic condition of the fishery." Wilkerson deposition, at 56-57, Docket No. 2218; *see* Docket No. 2222 at 4.

215. *See e.g.* Docket No. 409, Record in 9th Circuit Cause No. 74-2414, R. 1484; Docket No. 862, Record in 9th Circuit Cause No. 77-3654, R. 733; Docket No. 1170, *Id.* R. 756; Docket No. 1396, *Id.,* R. 790; Docket No. 1585, *Id.,* R. 814; Docket No. 2276, *Id.,* R. 923, Docket No. 2312, *Id.,* R. 931.

usual and accustomed fishing places. After full consideration, the treaty status of these tribes was confirmed and they now participate in treaty fisheries pursuant to the court's orders.[216] The Order for Program to Implement Interim Plan also permitted members of other intervening tribes to fish pending final adjudication of treaty status, subject to state regulations or the terms of any special fishing rights order.[217] Only four tribes have obtained such an order pending the Court's decision on their treaty status.[218]

Washington and its non-treaty fishermen have adamantly resisted making reductions in non-treaty fishing. Washington itself stimulated this resistance in 1974 by decreasing the sport salmon catch limit from three to two fish, over the opposition of Indian tribes who pointed out that the change would not make more fish available to tribal fisheries.[219] The State's action led to *Commercial Passenger Fishing Vessel Ass'n. v. State,* which is now before

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216. See First Supplemental Treaty Status Order, December 31, 1974, Docket No. 935½; Second Supplemental Treaty Status Order, February 26, 1975, Docket No. 1021.

217. October 8, 1974, Joint App. 441-42.

218. Washington twice misstates the facts on this matter. State Br. at 6, n. 5 and 31. Neither the Order Re Conditional Fishing Rights, Docket No. 1269, nor the Order for Program to Implement Interim Plan, Joint App. 441-42, requires or suggests that the tribes "establish to the court's satisfaction their 'blood quantum' ". Br. 6, n. 5. The orders simply preserve the status quo, permitting all tribal members to fish without a license as they have since *Tulee v. Washington,* 315 U.S. 681 (1942). Much later in the litigation, the District Court required five tribes to produce data regarding individual's descendancy from treaty signatories. Order Re Samish . . . Tribe's Treaty Status, March 19, 1976. Joint App. 454-55. However, the Order had no bearing on the Order Re Conditional Fishing Rights which required only membership, not descendancy. Further, it is now unlikely that the District Court has power to review tribal decisions to grant or deny benefits. *Cf. Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Finally, whether these intervenor tribes are "recognized" by the United States is an open issue; it is clear, however, that each tribe signed one of the treaties.

219. Memorandum Decision, September 12, 1976, Joint App. 427, 432.

the Court in No. 77-983. In the state court litigation, Washington officials publicly described their "distasteful" duty of complying with the federal court decisions.[220]

At approximately the same time the Puget Sound Gillnetters Association obtained a state court injunction which interfered *directly* with the federal court's orders. Washington could offer no alternative means of complying with the federal decision.[221] Upon motion of the United States, the District Court then enjoined execution of the state court order. [222]

In early 1975 Washington unilaterally revised the steelhead run size available to Indian fisheries on the theory that some fish were hatchery propagated. In disregard of applicable federal procedural orders, the Game Department seized Muckleshoot Indian nets and fish.[223] Again the District Court was forced to intervene.[224]

A few months later the Purse Seine Vessel Association sued Washington to prevent compliance with certain District Court orders relating to the sockeye and pink salmon

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220. *See* Transcript, September 2, 1974, at 30-32.

221. Memorandum Decision, September 12, 1974, Joint App. 427, 428-29.

222. *Id.*, Joint App. 427, 434. The federal court noted that the state suit lacked the real parties in interest and involved no full-scale evidentiary hearing. Affidavits of the litigants provided the only evidence and these were not subjected to cross-examination. Joint App. 431. The Court further found that the treaty tribes had taken fewer fish both in terms of numbers, and in percentage of harvest, up to that point in the 1974 season than they had during the years preceding the judicial apportionment in Final Decision No. 1. Joint App. 430.

223. Memorandum Decision, January 20, 1975, Joint App. 444, 447.

224. *Id.* The Court did not interfere with the litigation between the Department of Game and the Puyallup Tribe. *Id.* at 449. However, since neither the federal court orders nor the parties had previously distinguished between hatchery propagated and other fish, the court refrained from making a ruling pending a request that it consider the matter. Since that time a pre-trial schedule has been stipulated, Docket No. 5139, 5197 and a trial is scheduled for June 4, 1979.

fishery.[225] On motion of the United States, the District Court stayed the state court proceedings.[226] This time the state superior court held that it had not been properly enjoined and proceeded to judgment against the Department of Fisheries.[227] The judgment was affirmed by the Washington Supreme Court, *Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977).

On June 4, 1975, the Court of Appeals affirmed the District Court's 1974 opinion and orders in a thorough opinion. A concurring opinion decried the need for the District Court to retain continuing jurisdiction but added:

> The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten.[228]

In the fall of 1975, Washington's reluctant compliance forced the District Court to enter a series of further remedial orders designed to give the treaty tribes a realistic opportunity to share in the coho and chum salmon runs.[229] In response, many of Washington's non-treaty fishermen engaged "in a substantial fishery on the 1975 coho salmon run in direct violation of regulations issued by the State

225. The facts of the 1975 International Fishing case are set forth in the brief for the United States; *see also* Part VII A, *infra*.

226. App. H in Petition 77-983, Docket No. 1240, Record in 9th Circuit Cause No. 77-3654, R. 772.

227. *See* Docket No. 1337, Copy of Notice of Trial in State Superior Court.

228. *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975), Burns, J., concurring, Joint App. 31, at 59-60.

229. Docket No. 1381, Record in 9th Circuit Cause No. 77-3654, R. 782; Docket No. 1417, *Id.*, R. 792; Docket No. 1421A, *Id.*, R. 799, Docket No. 1555, *Id.*, R. 812.

of Washington and orders of [the] court."[230] The State of Washington did little to prevent these recurring violations. Citations were ordered thrown out by county prosecutors and local judges[231] and out of 300 citations issued to non-treaty fishermen, only one led to a penalty.[232]

The 1976 fishing season was similar. In April the Department of Game abruptly terminated a co-management agreement with the Quinault Tribe and threatened to arrest tribal employees moving steelhead smolts from the tribal hatchery to a river.[233] The Department's action was based on its interpretation of the state court decision in *Department of Game v. Puyallup Tribe*, 86 Wn. 2d 665, 548 P.2d 1058 (1976).[234] It apparently determined that the treaty right did not even extend to tribally reared hatchery fish.

During the fall salmon runs Washington authorized non-treaty fishermen to take much of the catch prior to the fish reaching the major tribal fishing areas.[235] When the State announced additional non-treaty fisheries, the District Court again had to intervene.[236] Undaunted, the Puget Sound Gillnetters Association publicly encouraged non-treaty fishermen to disregard the court-ordered closures.[237] Within four nights some 247 non-treaty vessels

230. Preliminary Injunction, October 27, 1975, Joint App. 450, §2.

231. Sgt. Lyle Nelson testimony, Transcript March 28, 1978, Joint App. 521, 524-25.

232. Oral ruling of Honorable George H. Boldt, Transcript October 25, 1975, Joint App. 499-500.

233. Memorandum of Facts, Exhibits H, I, Docket No. 2077.

234. *Id.*, Exhibits A, G, Docket No. 2077.

235. Order Re 1976 Coho Fishery, September 6, 1976, §3-5, Joint App. 466, at 467-68.

236. *Id.*, Joint App. 469-70.

237. Fisheries Advisory Board Report, November 17, 1976, Joint App. 551; *see also* Joint App. 602-03.

were observed illegally fishing.[238] Washington announced that it was unable to *control* the illegal fishing, although the Assistant Fisheries Director admitted that in some areas state *policy* was to make no arrests.[239]

Washington's position throughout the litigation had been that the Department of Fisheries had authority to limit non-treaty fishing so as to increase the number of fish available for harvest at usual and accustomed places.[240] Accordingly, until 1977 the District Court relied on Washington to promulgate regulations appropriate to that purpose. In 1977, however, a successful state court collateral attack foreclosed that remedial tool.

In June 1977, the Washington Supreme Court decided *Puget Sound Gillnetters Association v. Moos*,[241] an original action filed directly in the Supreme Court. In this, and subsequent rulings,[242] the state court opined that neither state statutes nor the Equal Protection Clause permitted Washington to restrict non-treaty fishing in order to make fish available at "usual and accustomed grounds and stations." The State Supreme Court decisions effectively required Washington to disregard the Interim Plan, 384 F. Supp. at 420, Joint App. 230.[243]

238. Transcript October 11, 1976, Docket No. 2573; *see* Joint App. 602.

239. Request for Determination, Docket No. 2574, Record in 9th Circuit Cause No. 77-3654, R. 961; B. Gruett Testimony, October 11, 1976, at 193-97; L. Nelson Testimony, Transcript March 28, 1978, Joint App. 521, 523-24; *see* Joint App. 603.

240. FF 204, 384 F.Supp. at 390, Joint App. 174.

241. 88 Wn.2d 677, 565 P.2d 1151 (1977), App. C in Petition No. 77-983.

242. *Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977); *Washington Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977), App. B in Petition No. 77-983.

243. *See* G. Sandison Testimony, Transcript August 8, 1977, Joint App. 513.

In advance of the 1977 fishing season, Washington adopted regulations which "made no allowance [and] no exceptions for the Indian opportunity to harvest."[244] When harvestable fish reached Lake Washington, the Department of Fisheries authorized sports harvesting but refused to allow treaty Indian net fishing.[245] The Director of Fisheries admitted that no conservation needs justified the restriction of the Indian fishery.[246]

The new circumstances compelled the District Court to directly allocate the opportunity to take fish.[247] The court accepted the unanimous report of a joint technical committee listing the harvestable numbers of fish for each 1977 run and the number of fish which had already been caught by Washington troll and sport fishermen.[248] Since both the treaty and non-treaty fleets possessed the ability to harvest a full 50 percent of the chinook, coho and chum salmon runs expected to return to usual and accustomed fishing grounds in Puget Sound,[249] the allocation order simply expressed the fishing opportunity to be accorded

244. P. Mundy Testimony, *Id.*, Joint App. 507; *see* 500-10; *see* FF 13 in Memorandum Order, August 31, 1977, Petition in No. 78-119, App. A 41-42.

245. FF 10 in Memorandum Order, August 31, 1977, Petition in No. 78-119, App. A 40-41.

246. *See* G. Sandison testimony, *supra*, n. 243, Joint App. 512, and FF 11 in Memorandum Order, *supra*, App. A 41.

247. FF 2-3 in Memorandum Order, *supra*, at App. A 36-37; *see* 573 F.2d 1123, 1130, Petition in No. 78-119, App. A-13.

248. The State Chief of Harvest Management testified that Washington estimates the number of salmon caught by sport fishermen prior to the season and that emergency openings or closings of sport fishing are rarely used. State regulations of permissible gear, seasons and catch size limits largely determine what the sport catch will be. The non-treaty commercial net fisheries inside Puget Sound are based upon the run sizes that escape the ocean troll and sport fisheries. *See* Transcript April 6, 1978 at 171-72, 174-80. Thus the Associations' concern, Association Br. 15, that the court's allocation limits only commercial net fisheries is misplaced. State regulations alone determine how fishing opportunity is divided among non-treaty sport and commercial fisheries.

249. Joint App. 459-60; Transcript August 8, 1977 at 58.

to each side in terms of the number of fish of each species in each region.[250] On the basis of the order, fisheries biologists of the treaty tribes and the State of Washington could, and each did, design fishing regulations so that neither fishery would preempt the others fishing opportunities.

In the 1977 salmon season illegal non-treaty fishing reached unprecedented heights. Washington informed the District Court that there was little possibility of obtaining state prosecutions or convictions for offenders.[251] and the Department of Fisheries said it would issue no State or federal citations designed to stop incursions into the treaty share.[252] A state fishery biologist observed nearly 200 non-treaty gillnet boats fishing in a closed area.[253] The situation, the District Court found

> if permitted to continue, will lead to a breakdown of law and order, . . . the substantial denial of federally guaranteed treaty fishing rights and will endanger the preservation of the fishery resource.[254]

Accordingly the court enjoined the state-licensed fisher-

250. In many cases, the non-treaty fleet had already taken much of the returning runs. To equalize the opportunities, tribal fisheries were given the opportunity to take most of the run which *actually* returned to the usual and accustomed places. The percentage available to each side *inside* Puget Sound reflects this adjustment. *Cf.* Order re 1976 Coho Fishery, September 6, 1976, §5, Joint App. 466, 468. Compare State's Brief at 11. The percentages referred to in the State's Brief are not of the total run, but only of the actual numbers of fish which reached the usual and accustomed places. These percentages are reached only after the other reductions, outlined above, are made from the total run bound for the tribal fishing grounds.

251. G. Sandison testimony, Transcript August 8, 1977, Joint App. 510 at 514, J. Johnson argument, Transcript August 26, 1977, Joint App. 514-15, W. Miller testimony, Transcript April 5, 1978, Joint App. 530, 533.

252. W. Miller testimony, Transcript September 22, 1977, Joint App. 519; Transcript April 5, 1978, Joint App. 530-31.

253. *See* Joint App. 599-600.

254. Temporary Restraining Order Re Enforcement of 1977 Fisheries, Docket No. 3265G, Record in 9th Circuit Cause No. 77-3654, R. 230-31.

men from violating the state regulations which implemented the allocation order.[255]

A highly organized campaign to violate the court's injunction has ensued. The National Marine Fisheries Service reported that about one-fourth of the non-Indian fishermen contacted indicated that they planned to violate the court's orders.[256] Non-treaty fishermen unloaded tons of illegally caught fish in "a carnival atmosphere, laughing and joking."[257] Shooting threats were reported.[258] Non-treaty fishermen extensively used citizens band radio equipment to report contacts with federal enforcement officers.

255. A series of hearings followed to determine whether preliminary injunctions should be entered. The procedural details are set out in the brief of the United States. The 1977 hearings were uniformly boycotted by non-treaty fishermen and their trade associations despite abundant notice of the proceedings. Attorneys for the Puget Sound Gillnetters and Purse Seine Owners Associations were served with copies of the United States' pleadings seeking the allocation orders, Docket No. 3087, Record in 9th Circuit Cause No. 77-3654, R. 6; Docket No. 3088, *Id.*, R. 16; Docket No. 3089; Docket No. 3090, of the tribes' joinder in that motion, Docket No. 3107, and of the proposed order, Docket No. 3178. It is noteworthy how carefully the Associations explain the process in order to mislead the Court. "No prior notice" of the September 12, 1977 order "was given to petitioners." Association Br. 19. Yet an affidavit in the record shows that notice was served on Petitioners' *attorneys*, Docket No. 3467, Record in 9th Circuit Cause No. 77-3654, R. 1167, 1170. Similarly notice of the September 22, 1977 hearing, was served on petitioners attorneys, Docket No. 3403. The Gillnetters do not discuss the extensive notice, by personal service and otherwise, given of the September 27, 1977 hearing, nor the massive efforts of the United States Marshals to personally serve *all* fishermen with notice of the hearings which led to the current order, dated June 6, 1978. *See e.g.*, Docket No. 3467, Record in 9th Circuit Cause No. 77-3654, R. 1167, 1170; Docket No. 4151, 4153, 4157, 4170, 4186, 4200, 4214, 4230, 4246, 4251. The latter service was made necessary only when Washington refused to mail out copies of the proposed injunction with its routine license renewal applications. *See* Docket No. 4049. A careful analysis of the Docket shows that attorneys for both Petitioner Associations have been on the parties' mailing list for service of documents since August 4, 1976, Docket No. 2324.

256. W. Lewis Testimony, Transcript September 22, 1977, Joint App. 515, 516.

257. *Id.* at 517.

258. *Id.* at 518.

A shore-based transmitter also warned illegal fishermen of the Coast Guard's approach.[259] Consequently, when enforcement vessels stopped to issue a citation most of the violators would escape.[260] After the season, the State's technicians reported that over 183,000 salmon had been taken illegally by state licensees.[261]

In early 1978 the court heard testimony and argument from the parties and many non-treaty fishermen, regarding whether an injunction should restrain illegal non-treaty fishing for an additional season. Counsel for the Puget Sound Gillnetters and the Purse Seine Vessel Owners participated[262] in the hearings although they entered appearances on behalf of individual fishermen, not the trade associations. Washington indicated that its policy of not enforcing restrictions on the non-treaty fleet would continue.[263] Accordingly, the court issued the injunction of June 6, 1978 which is before this court on certiorari before judgment of the Court of Appeals.

At least twice during the 1978 fishing season, Washing-

259. D. Gibler testimony, Transcript April 5, 1978, Joint App. 527, 529.

260. *Id.* at 530.

261. FF 26, Joint App. 482; *see* Transcript April 6, 1978 at 325, l. 14.

262. At page 21 of their brief, the Associations' attempt to argue that their ability to cross-examine and subpoena witnesses was restricted. They fail to point out, however, that counsel for the fishermen and the Associations declined the United States' and the tribes' offers to provide the witnesses voluntarily. Transcript April 5, 1978 at 114; Transcript April 6, 1978 at 350; FF 12 and 13, Findings of Fact, June 6, 1978, Joint App. 479, 480. In addition, none of the fishermen or the Associations present through their attorneys attempted to intervene. Finally, it should be noted that an examination of the transcript of the hearing of April 6, 1978 reveals that Mr. Yates, the attorney for the Puget Sound Gillnetters cross-examined the various witnesses at length. However, he purportedly did so at the behest of the Reefnetters Association, a party to the case, not on behalf of the Puget Sound Gillnetters Association or his individual fishermen clients.

263. W. Miller testimony, Transcript April 5, 1978, Joint App. 530, 533-34.

ton adopted regulations, not required for conservation, curtailing treaty Indian fisheries. In the Strait of Juan de Fuca, the State adopted emergency regulations forbidding treaty fisheries on the grounds that the tribes might intercept a few fish from runs needing protection. However the State simultaneously authorized non-treaty harvest in nearby areas, which had a much larger effect on the same weak fish runs.[264] Again, the District Court was forced to intervene. The court found no evidence showing that a total closure of treaty fishing was reasonable or necessary for conservation.[265]

Washington also exercised its emergency conservation authority[266] to close Indian fisheries in the wake of a dispute over the way a telephone hotline message announced openings and closing of *non*-treaty fishing.[267] It was undisputed that there was no conservation need for terminating Indian fishing; the matter was resolved in the Fisheries Advisory Board.[268]

Illegal non-treaty fishing raged in 1978. The Coast Guard Commander testified:

> [T]he fishermen are better organized this year. They have tailed our boats, reported our positions from the shore, from the water, from bridges. . . We find. . . one boat. . . the rest of them, of course, scatter. They are warned that we are coming.[269]

264. Affidavits Docket No. 5167, 5200, 5252; Fisheries Advisory Board Report of October 9, 1978, Joint App. 617, 619. *See* Motion, § 1-2, Joint App. 491, 492. As to the State's historical policy of basing "mixed stock fisheries" on value judgments, *see* FF 202, 384 F.Supp. at 390, Joint App. 173.

265. FF 4, Preliminary Injunction, November 3, 1978, Joint App. 494, 495.

266. 384 F.Supp. at 416, §19, Joint App. 225.

267. *See* Docket No. 5162, 5163.

268. Transcript October 16, 1978 at 28-29, *see* Fisheries Advisory Board Report 78-83A, Docket No. 5313.

269. Larkin testimony, Transcript November 3, 1978 at 12.

A National Marine Fisheries Service officer recounted hearing non-treaty fishermen joking as they were being arraigned for federal contempt of court, discussing when they would fish again in violation of the orders and speculating on the amount of fines they would have to pay.[270] By November 3, 1978, 177 citations had been issued ordering fishermen to appear and show cause why they should not be held in contempt.[271] Non-treaty fishermen took 95.3% of the 1978 illegal catch.[272]

Despite the illegal fishing the treaty tribes have obtained increasingly significant opportunities to take fish at usual and accustomed areas. In 1977 treaty fisheries harvested nearly 43% of the Puget Sound origin runs combined.[273] Of course, in the areas most heavily impacted by illegal non-treaty fishing the tribes took far less than their share. In 1977 at least, the District Court's accommodation of the rights of the parties was largely successful, in spite of "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."[274]

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270. Marshall testimony, *Id.* at 21.

271. *Id.* at 14. Approximately 50 of these citations were given to treaty Indians. *Id.* at 24. Many of these involved federal confusion over fishing areas or compiling regulations or fishermen found outside tribal usual and accustomed places. *Id.* at 27-28.

272. *See* Whitney testimony, Transcript November 3, 1978 at 7; Technical Advisor's Report Re Illegal Fishing, Docket No. 5314.

273. *See* Attachment to Fisheries Advisory Board Report No. 78-51. Joint App. 593. Importantly, this catch of approximately 750,000 fish represents only 9.5% of the total Washington harvest of 7,914,000 salmon. The tribes harvested additional fish from non-Puget Sound origin runs bringing their total catch to approximately 18% of the Washington harvest. The tribes do not assert that their opportunity to harvest non-Puget Sound stocks was restricted. Even within Puget Sound, the adjustment needed to raise 43% to 50% is slight.

274. 573 F.2d at 1126, App. A-3, Petition in No. 78-119.

SUMMARY OF ARGUMENT

I.

The final judgment of the District Court as affirmed by the Court of Appeals became final for purposes of *res judicata* in 1976 when this Court denied certiorari. *Brown v. Allen*, 344 U.S. 443, 446 (1953); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940). These appeals represent an attempt by the State and the Associations to relitigate the issues originally determined by the District Court in a subsequent federal enforcement proceeding, made necessary only by Petitioners' refusal to comply with the District Court's rulings.

The State of Washington was, of course, a party to *United States v. Washington* and is barred from relitigating issues, in state *or* federal court, that were finally determined in that case. Similarly, licensees of the State of Washington are in privity with the State and likewise bound by the judgment. *E.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

This Court must not acquiesce in the principle that a state, which has been afforded a full and fair opportunity to litigate the meaning of a federal right, can relitigate the issue in a subsequent enforcement proceeding made necessary by its refusal to comply with the original judgment.

II.

Notwithstanding the State's repeated assertions that treaty fishermen have been afforded an equal opportunity to fish, the evidence clearly demonstrates that the State authorized a virtual preemption of the treaty fishing right

by enacting regulations which allowed non-treaty fishermen to harvest approximately 95% of the resource before the fish migrate back to the tribal usual and accustomed grounds. Consistent with this Court's decisions that prevent preemption of treaty fishing rights the District Court required an allocation to "accommodate the rights of Indians under the Treaty and the rights of other people." *Department of Game of Washington v. Puyallup Tribe* (*Puyallup II*), 414 U.S. 44, 49 (1973).

III.

The District Court's decision reflects a comprehensive investigation into the anthropological and historical evidence concerning the negotiation of the treaties and the understanding of the parties. Construing the evidence in light of the established rules of law governing interpretation of Indian treaties, the District Court concluded that the tribes held a reserved treaty right, linked to the marine and fresh-water areas where the tribes traditionally fished, which exists in part to provide a volume of fish sufficient to meet the fair needs of the tribes. The right was to be exercised in common with non-Indians, who, the District Court determined, were entitled to take a share of the resource fair in comparison with the share taken by the tribes.

The State and the non-treaty fishermen have become so obsessed with the mechanics of the allocation, however, that they have obscured its actual workings. Contrary to the assertions of the State and the Associations, the allocation formula *does not* apply to all the fish landed or caught in the State of Washington. The tribal opportunity extends only to those fish "which, absent harvest en route,

would be available for harvest at the treaty tribes' usual and accustomed fishing places." The District Court, therefore, did *not* allocate "50% plus" of the *total* Washington salmon catch to the tribes as the State asserts. In 1977, for example, in which the tribes took 43% of the Puget Sound catch returning to their usual and accustomed grounds, the total tribal catch in Washington amounted to only 18% of the total Washington landings. This Court, if it reviews the District Court's allocation on the merits, must review it in its actual operation, not as falsely hypothesized by the State and the Associations.

In their briefs, the Petitioners not only distort the evidence concerning the circumstances surrounding the execution of the treaties, particularly the Indian insistence upon preserving their well-established commercial fisheries, but they completely ignore the nature of the treaty interpretation process. They totally disregard both the canons of construction applicable to Indian treaties and the precedents of this Court concerning the very treaties now at issue. The State's position, that *no* allocation is permissible and that the treaties secured the tribes only the right to compete equally as individuals with non-treaty fishermen, is simply a resurrection of arguments rejected by this Court over 75 years ago in *United States v. Winans*, 198 U.S. 371 (1905) and consistently rejected since.

The allocation decreed by the District Court is the *minimal* allocation to the tribes which successfully accommodates the clear intention of the parties to provide for the fair needs of the tribe, and, at the same time, accomplishes a sharing of the resource with non-treaty citizens. The Court's allocation is strongly supported by the facts,

the canons of construction, and the decisions of this Court involving reserved treaty rights. *See Winters v. United States,* 207 U.S. 564 (1908); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Arizona v. California,* 373 U.S. 546 (1963). Further, as the Court of Appeals recognized, the District Court's conclusion that the tribes and the non-treaty State licensees would share equally the resource passing through the tribal usual and accustomed grounds flows naturally from the fact that the two parties to the treaties, the United States and the tribes, bargained as sovereigns on the basis of formal equality. It is also strongly supported by the language of the treaties themselves and from the evidence concerning the contemporaneous use of that language in common parlance.

IV.

Notwithstanding the State's allegations, the State has retained its traditional conservation authority over Indian fisheries and, consistent with the Court's orders, may still unilaterally shut down tribal fishing in situations where a conservation problem is presented. In addition, the State of Washington continues to perform its traditional management functions such as estimating run sizes and escapement goals, monitoring fish runs and fishing effort during the season, and making the necessary in-season adjustments as needed. The District Court has *not* taken over management of the fishery.

On the other hand, in terms of *enforcement* of the decision, substantial difficulties have been encountered because of massive illegal fishing by State licensees that has developed and because of the refusal of the State to enforce the

decision or take any action whatsoever to protect Indian treaty fishing rights. The Washington Supreme Court has immensely encouraged this resistance to the decision by its refusal to give *res judicata* effect to the federal judgment and by its statements that the decision is erroneous and unconstitutional. As the Ninth Circuit correctly concluded, "[W]e do not see how, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner." 573 F.2d 1130.

The District Court's remedial orders have been designed to protect the fishing opportunity as defined in the original decision; they have been aimed at rectifying, to the extent possible, the consequences of State non-compliance with the tribal treaty fishing right and they addressed, with extreme delicacy, the root of the problem—a conceded State inability or unwillingness to manage the resource consistent with federal law. The Court has consistently utilized the least intrusive remedy available short of abandoning enforcement of the treaty right altogether. The District Court's orders, therefore, easily meet the tests of constraint counseled by such cases as *Milliken v. Bradley,* 433 U.S. 267, 280-81 (1977) and *Hutto v. Finney,* ..... U.S. ....., 98 S.Ct. 2565, 2572 (1978).

The District Court also acted properly in directly enjoining the non-treaty fishermen who were violating its orders. The non-treaty fishermen, as licensees of the State of Washington, are in privity with and represented by the State in the litigation. In these circumstances, it is well-established that the judgment against the State affecting its sovereign interests binds both the State and its individ-

ual licensees. *See, e.g., City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *New Jersey v. New York,* 345 U.S. 369 (1953). Non-treaty fishermen, therefore, being bound by the judgment, may properly be directly enjoined by the Court from violating the District Court's orders and interfering with the Indian treaty fishing right.

V.

Puget Sound Gillnetters Association v. Moos, 88 Wn.2d 677, 565 P.2d 1151 (1977) and *Washington State Commercial Passenger Fishing Vessels Association v. Tollefson,* 89 Wn.2d 276, 571 P.2d 1373 (1977), No. 77-983, represent direct attempts by the state court to prevent implementation of the federal treaty right and cannot be sustained in the face of the Supremacy Clause.

However, the state cases are not reviewable here on the merits since they present no justiciable case or controversy. *United States v. Johnson,* 319 U.S. 302 (1943). The parties were unified for the purpose of defeating the prior federal adjudications of the rights, the records were contrived and the results preordained.

The State Supreme Court cases are also void because of the failure of the State to give *res judicata* to the prior judgment of the federal court to which the State was a party.

ARGUMENT

I. The State of Washington and Its Privies, the Non-Treaty Fishermen and Their Associations, Are Barred By the Doctrine of Res Judicata From Relitigating the Meaning of the Stevens Treaties and Other Issues That Were Finally Resolved By the Federal Courts in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd., 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

In 1974, after extensive pre-trial preparation and an eighteen day trial during which time the various issues were aggressively contested by the State of Washington, the District Court entered its Finding of Fact, Conclusions of Law, Declaratory Judgment and Injunction. The Court of Appeal affirmed the decision and this Court denied certiorari in 1976. Although further proceedings have been necessary to implement the decision, the status of the declaratory judgment itself as a final judgment for purposes of *res judicata* and appeal is made clear by statute and case law. 28 U.S.C. §2201, enacted in 1938 to empower federal courts to enter declaratory judgments, provides:

> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, other than actions brought under §7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.*[275] (emphasis added)

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275. 28 U.S.C. §2202 allows the court to grant further necessary or proper relief "based on a declaratory judgment" against any adverse party whose rights have been determined by such judgment. Clearly, the "finality" of the judgment recognized by 28 U.S.C. §2201, is not undermined by the provision for implementation of the judgment. *Cf., Morgan v. McDonough,* 540 F.2d 527, 529 (1st Cir. 1976), *cert. denied,* 429 U.S. 1042 (1977).

It is well established that a declaratory judgment is entitled to *res judicata* effect in any subsequent civil proceeding. *See Aralleno-Flores v. Rosenberg,* 310 F.2d 118, 121 (9th Cir. 1962); *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.,* 253 F.2d 29, 30 (2d Cir. 1958); *Ma Chuck Moon v. Dulles,* 237 F.2d 241, 243 (9th Cir. 1956), *cert. denied,* 352 U.S. 1002 (1957); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123,* 137 F.2d 176, 179 (5th Cir. 1943), *aff'd.,* 321 U.S. 590 (1944). *See also* E. Bochard, *Declaratory Judgments,* 10-11 (2d ed. 1941); *see generally,* Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818 (1952). As §77 of the Restatement of Judgments puts it:

> Where an action is brought to obtain a declaration of the rights or other legal relations of the parties to the action, whether or not further relief is or could be prayed, a final and valid judgment declaring such rights or other relations is binding between the parties in subsequent actions.

See also Restatement (Second) Judgments §76 (Tentative Draft No. 3, April 15, 1976).

There being no reasonable doubt regarding the finality of a declaratory judgment for purposes of *res judicata,* the only question appears to be the effect of this Court's 1976 denial of certiorari. The State of Washington and the Fishing Associations in their briefs on the merits assume that they are free to relitigate the District Court's judgment, as affirmed by the Ninth Circuit Court of Appeals and for which this Court denied review in 1976. Similarly, the Washington Supreme Court apparently determined that it was not bound by the previous final judgment of the United States District Court even though the State of Washington was a party.

Although the State of Washington cites no authority in its brief regarding its ability to ignore ordinary principles of judicial finality, apparently it relies on the series of cases cited by the non-treaty fishermen's associations in their Reply Brief on Petition No. 78-139 at 9-13. These cases, however, simply do not support their position.

It is well established, of course, that the denial of a writ of certiorari by the Supreme Court imports no expression of opinion by the Court upon the merits of the case. *See e.g., United States v. Carver,* 260 U.S. 482, 490 (1923); *Brown v. Allen,* 344 U.S. 443, 451-52, 491-92 (1953); *Sunal v. Large,* 332 U.S. 174, 181 (1947); *House v. Mayo,* 324 U.S. 42, 48 (1945); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 366 n. 1 (1973). Hence a denial of certiorari is not a precedent for like action in a similar case and cannot be properly cited in support of any proposition at law; in short, denial of certiorari should, in ordinary circumstances, be accorded no *stare decisis* effect. *See generally,* R. Stern and E. Gressman, Supreme Court Practice, §5.7 (5th ed. 1978). *But see, United States v. Kras,* 409 U.S. 434, 442-43 (1973).

It is also well established that a denial of certiorari by the Supreme Court does not establish *law of the case,* at least for the Supreme Court itself. *See City of Indianapolis v. Chase National Bank,* 314 U.S. 63 (1941). Law of the case describes the effect to be given to a prior court ruling on a previous order in the same case; it plays an important role in stabilizing the law in situations where there are numerous lower court proceedings or appeals prior to a

final judgment.[276] However, after a case goes to final judgment, the doctrine of *res judicata* comes into play to prevent subsequent relitigation. *See generally* 1B MOORE'S FEDERAL PRACTICE, ¶0.404(1) (1947).

This Court has often held that a previous denial of certiorari to review some *non-final or interlocutory order* does not preclude the Supreme Court from later granting review and reaching all of the issues including those which the appellant originally sought to raise in the earlier petition for certiorari. As stated in *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916):

> It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the *interlocutory decision* may have been treated as setling the "law of the case" so as to furnish the rule for the guidance of the referee, the District Court and the Court of Appeals itself upon the second appeal, this court in now reviewing the *final decree* by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.

(emphasis added) *See also, City of Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973); *Mercer v.*

276. Law of the case is applied much more flexibly than *res judicata*, especially in the federal courts. As Mr. Justice Holmes explained in *Messenger v. Anderson*, 225 U.S. 436 (1912):

> In the absence of statute, the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

225 U.S. at 444. Similarly, as this Court stated in *Southern Railway Co. v. Clift*, 260 U.S. 316, 319 (1922):

> The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supercedes it and compels judgment.

Theriot, 377 U.S. 152 (1964); *Reece v. Georgia*, 350 U.S. 85, 87 (1955). *Res judicata* has no application in this application in this situation since the doctrine applies only to final judgments. *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916); *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 801 (1949). *See also, Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n. 1 (1973).

On the other hand, a denial of a petition for certiorari to review a *final judgment*, although obviously not an affirmance of a final judgment entitled to any *stare decisis* effect, does end the proceedings for purposes of *res judicata*. As this Court stated in *Brown v. Allen*, 344 U.S. 443, 456, "[D]enial of certiorari marks final action on State criminal proceedings. In fields other than habeas corpus with its unique opportunities for repetitious litigation . . . the denial would make the issues *res judicata*."

The distinction between the *stare decisis* and *res judicata* effect of the denial of a petition for certiorari to review a final judgment was cogently explained by Justice Jackson in his concurring opinion in *Brown v. Allen:*

> I can see order in the confusion as to its meaning [denial of a writ of certiorari] only by distinguishing its significance under the doctrine of *stare decisis*, from its effect under the doctrine of *res judicata*. I agree that, as *stare decisis*, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But for the case in which certiorari is denied, its minimum meaning is that this court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata* as applied either by state or federal courts. A civil or criminal judgment usually becomes *res judicata* in the sense that it is binding and conclusive even if new facts are

> discovered, and even if a new theory of law were thought up, except for some provisions for granting of new trial which usually is discretionary with a trial court and limited in time.

344 U.S. at 543.

Other cases holding that a denial of a petition to review a final judgment makes the judgment *res judicata* include *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940); *Maggio v. Zeitz,* 333 U.S. 56 (1948); *Deane Hill Country Club Inc. v. City of Knoxville,* 379 F.2d 321, 326 (6th Cir. 1967), *cert. denied,* 389 U.S. 975 (1967); *Goss v. Illinois,* 312 F.2d 257, 259 (7th Cir. 1963); *Dairy Distributors, Inc. v. Western Conf. of Teamsters,* 294 F.2d 348 (10th Cir. 1961).[277]

The distinction between the effect of a denial of a petition for certiorari to review a non-final order as law of the case, and the effect of a denial to review a final judgment as *res judicata* is exemplified by comparing *City of Indianapolis v. Chase National Bank,* 314 U.S. 63 (1941) with *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940). In *Chase National Bank,* the District Court had held that no diversity of citizenship existed and dismissed the complaint. The Court of Appeals reversed and remanded the case to the District Court for further proceedings. A petition for certiorari to review the decision of the Court of Appeals was denied. Subsequently, the District Court rendered a decision on the merits, the Court of Appeals reversed on the merits and the Supreme Court

277. As the Tenth Circuit Court of Appeals explained:

> In the instant case certiorari was sought and denied by the Supreme Court of the United States of the judgment of the Supreme Court of Utah. Such denial does not establish the correctness of the particular judgment but serves only to establish the finality of the judgment as between the particular parties. The same issue cannot be renewed by initiation of an action in the United States District Court.

Id. at 352.

granted the petition for certiorari. On review, the Supreme Court reversed on the ground that no diversity of citizenship existed, the same issue raised by the original petition. Since no final judgment had been entered by the court below at the time of the original petition for certiorari, no *res judicata* issue was presented.

On the other hand, in *Sunshine Anthracite,* appellant had applied for an exemption from the Bituminous Coal Act on the ground that its coal was not "bituminous" within the meaning of the Act. The application for exemption was denied by the National Bituminous Coal Commission and the Court of Appeals affirmed on the merits. The Supreme Court denied certiorari, *Sunshine Anthracite Coal Co. v. Ickes,* 308 U.S. 604 (1939). Subsequently, consistent with the Act, the United States demanded payment of certain taxes. Appellant filed suit before a three-judge federal court to enjoin collection of the tax. The District Court upheld the constitutionality of the Bituminous Coal Act and dismissed on the merits. A direct appeal was taken to the United States Supreme Court in which the appellant challenged not only the constitutionality of the Act, but also the entitlement to the exemption based on the defination of bituminous coal under the Act. Regarding that issue, the Court stated:

> Further, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under §6(b) of the Commission's denial of its application for exemption.

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. at 400. The Supreme Court held that the original action, made final by the denial of certiorari, was *res judicata:*

> A judgment is *res judicata* in a second action upon the

> same claim between the same parties or those in privity with them.

310 U.S. at 402.

Similarly, in *Maggio v. Zeitz, supra,* the Court held that a bankruptcy turnover order, as affirmed by the Court of Appeals and for which the Supreme Court had denied certiorari, was a final judgment for *res judicata* purposes as to the issue actually litigated. Consequently, the judgment itself could not be collaterally attacked in a subsequent civil contempt proceeding. As the Court stated:

> We agree with the Court of Appeals that the turnover order may not be attacked in the contempt proceedings because it is *res judicata* on this issue of possession at the time as of which it speaks.[278]

333 U.S. at 75.

The United States, the tribes and the State of Washington fully litigated the treaty interpretation issues in Final Decision No. 1. The District Court's judgment, as affirmed by the Ninth Circuit Court of Appeals, became final upon the denial of certiorari by the United States Supreme Court in 1976. The judgment should be accorded *res judicata* effect. As summarized in §1 of the Restatement of Judgments (1942):

> Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties in the cause of action, and

278. The Court held, however, that the earlier denial of certiorari was not *res judicata* on the issue of possession at the time of the subsequent civil contempt proceedings, a different issue. *Id.*

Justice Frankfurter, in dissent, agreed that the denial of Petition for Certiorari rendered the turnover order final for *res judicata* puposes:

> To be sure, the denial of a petition for certiorari carries no substantive implications. Reference here is relevant as proof of the finality with which the turnover order, as affirmed by the Circuit Court of Appeals, was invested.

333 U.S. at 83.

> the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.

The tribes do not contend that this Court lacks *power* to reexamine the treaty interpretation issues for which it denied certiorari in 1976. The doctrine of *res judicata* is judicial in origin, *see Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948) and is founded on sound public policy; it is not the effect of the doctrine, however, to deny this Court *jurisdiction* to review issues of a final judgment after it has already declined review. Courts have, on occasion, held that application of the doctrine of *res judicata* was superceded by some strong overriding public policy consideration or to avoid manifest injustice to a party. *See generally* 1B *Moore's Federal Practice,* ¶0.405 [11] (1974).

In the instant case the policy considerations behind the rule lead to the inescapable conclusion that this is precisely the kind of situation where application of the rule is called for. In *Commissioner v. Sunnen,* 333 U.S. 591 (1948), the Court described the doctrine of *res judicata* and its public policy foundation as follows:

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and the privies are thereafter bound not only as to every matter which has been offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. *Cromwell v. County of Sac,* 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into

> litigation between the parties upon any ground whatsoever, absent fraud or some other factor invalidating the judgment.

333 U.S. at 597. *See also Blonder-Tongue v. University Foundation,* 402 U.S. 313 (1971) where the Court abolished the mutuality rule and gave collateral estoppel effect to a previously-litigated patent infringement issue, stating:

> The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.

402 U.S. at 328.

The public policy of putting an end to litigation lies at the foundation of the rule. If a party has been successful in obtaining a judgment in his favor, ordinarily he should not be subject to further litigation with respect to that issue; similarly, if a party has had an issue resolved against him it is not ordinarily unfair that he should be deprived of any privilege of litigating that issue. Further, if a fair opportunity has been provided to both parties to litigate the issues, it is in the public interest that relitigation of the judgment not be permitted. *See Restatement of Judgments,* §1 Comment a (1942). The doctrine helps prevent inconsistent and conflicting decisions, minimizes the harassment of litigants, and helps conserve public and judicial resources.[279]

The State has not advanced any justifications for overcoming these predominant and ordinarily triumphant principles in the instant case. There has been no showing that the decisions below contravene public policy, that any

279. *See generally* Currie, *Res Judicata: The Neglected Defense,* 45 U. Chi. L. Rev. 317 (1978); Vestal, *Judicata/Preclusion by Judgment: The Law Applied in Federal Courts,* 66 Mich. L. Rev. 1723 (1968); *Developments in the Law/Res Judicata,* 65 Harv. L. Rev. 818, 820 (1952); F. James Jr., Civil Procedure, §11.1 at 517-18 (1965); 1B MOORE'S FEDERAL PRACTICE, ¶0.405 at 624 (1974).

decision upon which they are based has been overruled, that the court was in any way lacking jurisdiction, or that any newly discovered evidence has been unearthed which would justify reopening these issues. From the perspective of the tribes, the United States, and the federal courts, on the other hand, there are strong reasons why the State's attempt to relitigate these issues should not be sanctioned. The District Court entered its final judgment in this case in February 1974. The pre-trial procedures and the trial itself were comprehensive. Since 1974, the tribes and the United States, as well as the District Court itself, have been engaged in an effort to implement the principles declared by the decision. In light of these good faith efforts, it would be highly unfair to allow these principles to be jeopardized by a collateral attack five years after the decision.

Moreover, as a matter of equity, it is highly relevant that this is but one of a series of attempts by the State of Washington to overturn the decision, one more ". . . extraordinary machination in resisting the decree. . ." 573 F.2d at 1126. It is hardly in the interest of sound public policy that a party who has generated a second series of appeals from a final judgment by its resistance to the implementation of the original federal District Court judgment should be allowed to use the secondary appeals to collaterally attack the original judgment.[280]

280. This consideration is particularly weighty in the context of a denial of certiorari to review the original final judgment. Since this Court denies approximately 90% of the petitions for certiorari presented to it, *see* R. Stern and E. Gressman, Supreme Court Practice, §4.2 at 260 (5th ed. 1978), it is critical that a denial of certiorari to review a final judgment be treated as ending the litigation for *res judicata* purposes. To adopt any other rule, of course, will only encourage parties who are unsuccessful in obtaining review by the Writ to resist implementation of the lower court's decision in the hope that the judgment may be collaterally attacked in an enforcement proceeding. Such a precedent would be disastrous for the federal judiciary.

It encourages a waste of resources as to matters settled, or conceded,[281] or revived repeatedly. The parties remain in a suspended state of uncertainty as today's ruling endures only until tomorrow's resistance. The result of depriving federal decrees of their preclusive effect, illustrated graphically here, is widespread civil disobedience amounting to an industry-wide contempt of court. This Court has expressed its disapproval of such collateral attacks in a variety of contexts.[282]

In sum, all of the prerequisites for application of the doctrine of *res judicata* are present, this Court should hold that the attempt at relitigation of the issues determined in the original judgment in *United States v. Washington* is barred. There can be no question that the prior judgment was rendered by a Court of competent jurisdiction, that it was a final judgment on the merits, that the same cause of action is involved in both suits, and that the same parties, or those

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281. In various courts, the State has changed positions "as nimbly as if dancing a quadrille." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 540 (1978). For example, in the initial appeal before the Ninth Circuit, the State urged that an "appropriate" allocation for salmon was ⅓ (sports), ⅓ (non-treaty commercial) and ⅓ (treaty). *See* Reply Brief of Appellants Department of Fisheries and State of Washington, 9th Circuit Cause No. 74-2414, December 26, 1974, at 20. Here, however, the State finds no basis for any allocation in the treaty, State Br. at 38-56, unless it is one defined wholly at the discretion of the State. *Id.* at 94-99.

282. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967); *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947); *Stone v. Powell*, 428 U.S. 465, 493-95 (1977) (holding that considerations of economy and avoidance of nuisance litigation forbid federal habeas reconsideration of Fourth Amendment issues already litigated in the State courts); *Adams v. Illinois*, 405 U.S. 278 (1972), (holding non-retroactive and inapplicable to hearings already completed, the rule of *Coleman v. Alabama*, 399 U.S. 1 (1970) that counsel be present at a preliminary hearing); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), (sustaining the dismissal of a federal complaint where federal water rights are already being litigated in State courts).

in privy with them, are involved in both actions. *See Commissioner v. Sunnen*, 331 U.S. 597.

Regarding the last point, it must be emphasized that the final judgment is also *res judicata* against Washington's licensees, non-Indian fishermen, including the Petitioners in No. 78-139, because they are in privity with, and represented by, the State of Washington in this litigation. Just as the non-treaty fishermen and their Associations would have benefitted from any judgment in favor of the State of Washington, so too are they bound by the adverse result. The interests of the non-treaty fishermen are wholly derived from the State of Washington; the collective sum of those rights can be no more than the total right to fish "in common with" the tribes held by the State on behalf of its citizens. In these circumstances, a judgment against the State affecting those fisheries binds both the State and its individual licensees. *See, e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958); *New Jersey v. New York*, 345 U.S. 369 (1953). This issue is discussed in much greater detail in part IV, *infra*, in response to the Associations' argument that the District Court's orders cannot be enforced upon them because they were not parties to the original proceedings.

Finally, in light of the relief that is available to litigants pursuant to Rule of Civil Procedure 60(b), it is particularly clear that this Court should not encourage litigants to disobey and frustrate lower court decrees to obtain a vehicle for obtaining Supreme Court review, as the Petitioners have done here. The State and the non-treaty fishermen should not be rewarded in this appeal for the recalcitrant refusal to comply with the orders of the District Court below.

Rule 60(b) provides that a party may move the court to relieve it from a final judgment or order on the ground that "(5) . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should be given prospective application; or (6) any other reason justifying relief from the operation of the judgment." Federal courts have continuing power to modify their judgments. As this Court stated in *Systems Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961):

> The court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned, through changing circumstances into an instrument of wrong.'

Quoting *United States v. Swift & Co.*, 280 U.S. 114 (1932). In attempting to obtain review of the District Court's final judgment in *United States v. Washington* by collaterally attacking the Court's enforcement orders in these appeals, the State has inappropriately circumvented the rule which is designed to allow modification of judgments when necessary in the interest of justice.

Rule 60(b) is the only appropriate method for those issues to be reopened at this time.[283] Accordingly, this Court should dismiss the Petitions as improvidently granted insofar as they would grant review of questions already determined by the District Court decision, affirmed by the Ninth

283. If the State were able to show, for example, that the fair needs of the tribes could be met with a smaller share of the resource than was allocated to them by the District Court, or that the tribes were wasting fish, so that the original judgment has been turned into "an instrument of wrong," Rule 60(b) would provide an appropriate vehicle to request an appropriate modification of the judgment. Similarly, a Rule 60(b) motion could be utilized by the State to seek modification based on changes in the law after the judgment was rendered.

Circuit Court of Appeals, and for which certiorari has been denied.[284]

II. An Allocation of Opportunity Is Necessary To Prevent Preemption of the Treaty Fishing Right.

If the underlying decision of the District Court is not dispensed with on the grounds of *res judicata* as discussed in the previous section, then it is necessary to reach the merits of the Court's allocation orders.

The State of Washington and the non-treaty fishermen's associations argue that, properly construed, the Stevens Treaties mean *only* that "each individual fisherman, Indian and non-Indian alike, has the right to participate in the fishery on a non-discriminatory basis and that the individual Indian treaty fisherman cannot be denied access to the fishery needed to exercise that right." State Brief at 35. They take the extreme position that the treaty language neither requires nor permits *any* allocation of the fishery resource between treaty fishermen and other citizens of the State of Washington. *Id.;* Puget Sound Gillnetters Brief at 24. That such an argument should be presented to this Court is anomalous; it marks an attempt by the State to

284. The tribes are aware, of course, that the State has pending before the District Court a motion to modify the judgment which has not yet been acted upon. However, Washington's complaint that the motion has been pending for a long time does not undermine the tribes' argument. If the State believes that ruling on its motion has been delayed unreasonably, it could simply renew its request to the District Court and seek expedition from the court, or, alternatively, file a petition for writ of mandamus to the Court of Appeals and attempt to compel a ruling.

It is quite apparent to the tribes, and must also be to the District Court, that the State has focused its collateral attack on its appeal of the enforcement orders and that the appeals seek to challenge virtually every aspect of the District Court's orders. In these circumstances it is not surprising that the District Court has deferred action while the matters were pending before the Court of Appeals and this Court.

In any event, this Court should not hear the State's collateral attack on the original Final Judgment and the fact that the District Court has not ruled on the State's motion does not alter this result.

resurrect arguments rejected by this Court over seventy years ago in *United States v. Winans*, 198 U.S. 371 (1905). It is particularly surprising in light of this Court's clear recognition of the need for an allocation in the *Puyallup cases*[285] and in light of the position taken by the Department of Fisheries below that an "appropriate allocation" of the salmon resource would be one-third to sports fishermen, one-third for non-treaty commercial fishermen, and one-third for treaty fishermen.[286] The State now attempts to reopen its concession made years ago concerning the need for an allocation. Further, the State's argument is a naked effort to relitigate, in this appellate forum, the findings of fact that underlie the District Court's determination and which were affirmed by the Court of Appeals in 1975.

Indeed, the entire position the State articulates is founded on a false factual premise, a premise specifically rejected by the District Court in its findings of fact—that Indian fishermen have been afforded an equal opportunity to harvest a fair share of the resource and would be afforded such an opportunity if the State makes no allocation whatsoever. In reality, because of the scope and intensity of the non-treaty fishing effort that occurs *before* the fish reach the tribal usual and accustomed grounds to which the tribal treaty rights are limited, the tribal opportunity, especially in the terminal areas such as South Puget Sound,

285. *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) (hereinafter *Puyallup I*); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973) (hereinafter *Puyallup II*); *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977) (hereinafter *Puyallup III*).

286. See Reply Brief of Appellant Department of Fisheries and State of Washington, No. 74-2414, 9th Cir., December 26, 1974 at 20:

> Appellant proposes that an objective sharing formula should take cognizance of the purpose of fishing, and, treating the Indians subsistence and ceremonial fisheries specially, should provide the Indians with a one-third share of the remaining harvest of the base stock.

is effectively preempted before the Indian gear touches the water. As the Court of Appeals recognized, preservation of any meaningful treaty opportunity necessarily entails limiting the non-treaty fishery. 573 F.2d at 1130.

The basic circumstances that make it necessary for the District Court to require an allocation of the resource to prevent preemption and destruction of the treaty fishing right center around three circumstances: 1) the nature of the anadromous fish runs; 2) the location of the Indian treaty-protected fishing grounds in the "terminal areas" at the end of the migration path, FF 217, 384 F.Supp. at 393, Joint App. at 179-80; and 3) the pattern of State regulation which has authorized harvest of the runs before they reach the Indian fishing grounds, FF 218, 384 F.Supp. at 393, Joint App. at 180. The problems, inherent in the geography, and State regulatory pattern, have been severly compounded by the modern-day scarcity of fish.[287]

As demonstrated by fish tagging studies and the correlation of spawning escapements to mature salmon runs, anadromous fish runs are uniquely adapted to allocation because their behavior is highly predictable. The anadromous fish of Western Washington need not be "shepherded" to the stream gravel where they were hatched years before since their homing instinct as they return to spawn and die is perfect. So precise is their run timing, and so predictable their migratory pathways, that anadromous fish are highly susceptible to interception and capture by fisheries many tens or hundreds of miles from the natal streams. Unless fishing is constrained throughout the migratory cycle, fish harvesting must be totally banned in order to protect the

287. These factors are highly interrelated since State regulations have, in the past, permitted excessive harvest of the runs, leading to modern scarcity problems. *See* Statement of the Case, *supra*.

runs well before salmon and steelhead reach full size and enter the rivers.

State regulations which authorize fish catching during various stages of the salmon migratory cycle are intended to, and have the effect of, distributing these catches among would-be fishermen. Any regulation which places a limitation on fishing effort or prohibits fishing entirely at any given point in the run has the effect of "allocating" the fish catch to the fishermen whose effort occurs at another place or time in the migration. As Washington's Mr. Justice Utter stated, "Such allocation has been the principal effect of Department regulation for many years.[288] The question really is, therefore, to whom are the harvestable fish allocated, or, put another way, whose fisheries should be curtailed when fishing must be restrained.

The State's answer has given no recognition to the reserved federal rights. The inescapable fact is that since the 1890's, State "conservation" regulations have enabled non-treaty fishing interests to preempt the anadromous fish harvest. The treaty Indian fisheries, typically the last ones to take from the fish run because of their location,[289] are cut off.[290]

288. *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 89 Wn.2d 276, 288 (1977), Petition No. 77-983, App. B-13. Both the Department of Fisheries and the American Institute of Fishery Research Biologists agree that one of the goals of management is "allocation of the yield among competing fisheries." *Amicus Curiae* American Institute of Fishery Research Biologists, Br. 14; *See* FPTO, §3-577.

289. FF 198, 384 F. Supp. at 389, Joint App. at 172.

290. This has been widely recognized both in the lower courts' decisions and in other cases. In *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963), the Court found that "conservation" as used in Oregon salmon regulations, was merely a label for a regulatory system which sought only to protect non-treaty commercial and sport fisheries. In a later case, *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), the district court again noted the concern of state regulations for allocation as well as perpetuation of the fish runs. *Id.* at 911.

As shown in the Statement of the Case, Washington law has increasingly provided for non-treaty preemption of the anadromous fish harvests, first by prohibiting Indian fisheries in rivers and estuaries and second by authorizing interception of the fish runs by mechanized fisheries astride the migration routes in the open waters of Puget Sound and by trollers and "sports" charterers in the Pacific Ocean.

Although the preemption of the tribal fishery occurs largely because of geographic factors—the concentration of non-Indian effort on the runs before they reach the tribal areas, the problem has been severely aggravated because of the failure of the State to enact any timely restraints on the number of non-treaty commercial fishermen. This multitude of State-licensed fishermen has shifted the balance between man and the anadromous fish from that at treaty times, when,

> Because of the great abundance of fish resources and [the] limited populations, there was no need to regulate the taking of fish by either Indians or non-Indians.[291]

Now, there is an urgent need to conserve salmon. Overfishing must be prevented to perpetuate the species, and to continue the productivity of the resource. The total fishing capability of all fishermen in Western Washington is sufficient, absent regulation, to decimate the resource.[292] As outlined in the Statement of the Case, this combination of factors resulted in a total tribal harvest in the years before the decision averaging about 5% of the total catch at [illegible]ual and accustomed places.

291. FF 9, 384 F. Supp. at 352, Joint App. at 103.

292. *See* RCW 75.28.500, where the State legislature recognized an overabundance of commercial fishing gear in state waters causing gr[illegible] pressure on the fishing resource and initiated a program to "buy ba[illegible] fishing gear from the fishermen.

This result is clearly inconsistent with the decisions of this Court. Beginning with *United States v. Winans,* 198 U.S. 371 (1905), where this Court refused to allow a non-Indian fish wheel operator to monopolize an Indian fishery, this Court has prohibited non-treaty preemption of the treaty-protected fishing right. Similarly, the state-authorized monopoly by rod and reel fishermen of the steelhead runs came before the Court in the *Puyallup* cases. The Court noted:

> The ban on all net fishing in the Puyallup Rivers for steelhead grants, in effect, the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

Puyallup II, 414 U.S. 44, 46-47 (1973). Although there was no doubt that Indians were free to pursue steelhead in the same manner as sports fishermen, the Court recognized that the treaty tribe had reserved special rights to harvest a portion of the catch at their usual and accustomed places and held that an apportionment was required:

> If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then *that number must in some manner be fairly apportioned* between Indian net fishing and non-Indian sports fishing . . .
>
> *The aim is to accommodate the rights* of Indians under the Treaty and the right of other people.

Puyallup II, supra, at 48-49 (emphasis added). In *Puyallup III,* 433 U.S. 165 (1977), of course, the allocation decreed by the trial court pursuant to *Puyallup II* was upheld.

What the District Court accomplished by its Final Decision and orders, was to "fairly apportion" the harvestable salmon between non-treaty and treaty fisheries. This, as Mr. Justice Utter concluded,

> is entirely consistent with the Supreme Court's holding in *Puyallup II* and adds nothing new to it.[293]

The holdings of this Court in *Puyallup II* and *Puyallup III* are clearly inconsistent with the position of the State of Washington and the fishing associations that *no* allocation whatsoever is necessary or appropriate under the treaties. Their attempts to distinguish the cases are completely unpersuasive.

At pages 60 and 61 of its brief, the State admits that the Court in *Puyallup III* approved an allocation designed to effectuate the accommodation between the Indian and non-Indian fishery required by *Puyallup II,* and that the allocation was necessary because "the State could not effectively conserve the steelhead resource in a non-discriminatory fashion without such an allocation." It defies logic, however, in the circumstances of this case, to argue that an allocation is necessary and appropriate for steelhead but not for the salmon fishery. In support of this argument, the State says only that the *Puyallup* allocation was, required to prevent total preemption of the steelhead resource while state regulations governing salmon fishing were non-discriminatory.

This assertion of non-discrimination is as absurd as the State's related contention that Indians enjoy an equal opportunity to fish. As the District Court specifically found:

> The regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plain-

293. *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wn.2d 276, 297 (1977), Petition No. 77-983, App. B-22 (Utter, J. dissenting).

> tiff tribes' usual and accustomed fishing places to which the treaties apply.

FF 217, 384 F.Supp. at 393, Joint App. 179-180.

And:

> The State and Director of Fisheries have, by statute and regulation, totally closed a substantial number of the usual and accustomed fishing areas of Plaintiff tribes to all forms of net fishing while permitting commercial net fishing for salmon elsewhere on the same runs of fish.

FF 218, 384 F.Supp. at 393, Joint App. at 180. *See also* FF 217; *id.* Other examples of State discrimination abound. *See* FF 193-195, 384 F.Supp. at 388, Joint App. at 170-171; Statement of the Case, *supra*.

The findings of the District Court and supporting evidence make it clear that the State has authorized an inappropriate share of the harvest to be taken by non-Indians and denied a fair harvest opportunity to the tribes. Without an allocation, the Washington Department of Fisheries has and will continue to effectively abrogate the Indian treaty right of "taking fish."

III. The Allocation Decreed By the District Court Was an Appropriate Allocation of the Resource Which Protected the Treaty Right to Fish Consistent With the Treaty Mandate of Sharing the Resource With Non-Treaty Fishermen.

A. *Appellants Have Grossly Distorted the Actual Effect of the District Court's Allocation Orders and the Respective Shares of the Treaty and Non-Treaty Fishermen.*

The argument of the State of Washington concerning the effect of the District Court's allocation order is less than accurate. The State notes that the total annual harvest

of the State of Washington is approximately eight million fish. State's Brief at 6. It then describes the District Court's allocation order as mandating an allocation of 50% of these fish to the tribes, plus a tribally-designated reservation catch, plus a tribally-designated ceremonial and subsistence catch, plus the harvest of the Indian fishermen outside their usual and accustomed grounds. The State characterizes the allocation formula as "50% plus."

As is apparent from the Statement of the Case above, this is a gross distortion of the working of the District Court's allocation orders. What the State is attempting to mask is the fact that a very substantial portion of the total Washington landings are unaffected by the allocation order. As a result, consistent with the District Court's orders, non-treaty fishermen can and do lawfully harvest far in excess of 50% of the Washington-caught salmon and steelhead. As noted in the Statement of the Case, the catch tables prepared by the State of Washington graphically demonstrate that in 1977, for example, non-treaty fisheries captured 82% of the total Washington landings of 7,914,000 salmon.

If this Court is to examine the propriety of the District Court's allocation orders, it is essential that the actual orders be reviewed, and not some hypothetical characterization. Particular attention should be addressed to the Order on Certain Questions, Joint App. at 456. Accordingly, the inaccuracies in the State's characterization will be briefly summarized.

1. Fish which would not return to usual and accustomed places are excluded. The Court's apportionment formula provides that the tribes shall have an opportunity to har-

vest their share of fish, "which, absent harvest enroute, would be available for harvest *at the treaty tribes' usual and accustomed fishing places.*" 384 F.Supp. at 344, Joint App. at 90 (emphasis added). Since many of the fish caught by Washington citizens would never have been available for harvest at tribal usual and accustomed places because they are migrating to unrelated distant rivers, they are automatically excluded from the allocation. In addition, the allocation formula only applies to fish which would be available at the usual and accustomed grounds absent harvest. As a result, the allocation orders make a substantial adjustment for "adult equivalents." Any juvenile fish caught by a non-treaty fishermen, for example, which would not have successfully migrated to the usual and accustomed fishing grounds because of natural mortality or harvest by *foreign* fishermen is excluded. Joint App. at 458-59. The magnitude of this adjustment is apparent by comparing Tables 6 and 7 of the State's catch figures. Joint App. at 640-41. As a result, only approximately one-third of the sport and troll catch in the ocean, one of the largest fisheries in Washington, is included in determining the non-treaty harvestable share. Transcript April 6, 1978 at 276.

2. "Opportunity" does not mean guaranteed catch, and in situations where the tribes lack adequate fishing power to harvest their share, the excess is made available to the non-treaty fishermen. The District Court has established a procedure under which the tribes must submit documentation of their expected fishing power. Joint App. 459. In any situation where the tribes do not have adequate fishing gear to harvest their full share, the excess is made available to the non-treaty fishermen. Indeed, it is only in

cases where the tribes have undisputed fishing power to take their full share that any allocation has been decreed.[294]

3. Equitable adjustment does not give the tribes more than 50% of the stocks which return to tribal areas. The original provision regarding equitable adjustment is no longer in effect since it was designed to counteract the fact that Washington fishermen took many fish bound for usual and accustomed places outside the tribes' usual and accustomed places. Under the Court's April 13, 1976, Order On Certain Questions, Joint App. at 459, the tribes' share is now measured according to harvestable numbers of salmon "that would return to fishing areas in the absence of non-treaty fishing." This automatically takes account for the non-treaty catch by Washington fishermen outside the usual and accustomed places and the equitable adjustment provision is no longer utilized.

4. Neither treaty nor non-treaty fish used for subsistence purposes are included in the allocation. Non-treaty commercial "take home" catch is not reported and does not count towards the total non-treaty share. In 1977, the Puget Sound treaty subsistence catch was approximately 35,000 salmon, 4.7% of the total Puget Sound origin treaty harvest. Joint App. at 593. The State commercial "take home" catch may be as large as 5% of the non-treaty commercial catch. *See* Transcript April 6, 1978, at 183. This is a much higher total, of course, because of the size of the non-treaty

294. This concept is critical in the IPSFC fisheries where the salmon runs are highly concentrated and pass through the tribal places in a short span of time. The regulations promulgated by the United States are founded on the assumption that the tribes do not have adequate fishing power, because of their limited gear, to take their full share in this area. As a result, the federal regulations governing this fishery have not required that 50% of these runs be harvested by treaty fishermen. In 1977, the non-treaty fisheries were allowed approximately 88% of that harvest. This is calculated from the State tables shown at the Joint App. at 637-38.

commercial catch. *See* Tables at Joint App. 635-39. As a result, neither the treaty nor non-treaty subsistence catch affects the allocation formula. The only difference is that the tribes are required to report their subsistence catch to the Court while the State fishermen are not. *See* Docket No. 4798.

5. Harvests by the State and some sport catches are excluded. The State's hatchery programs produce a large number of "jacks" which have no adult equivalents since they do not generally spawn. These precocious male salmon do not count towards the allocation. Docket No. 2787; Record in Court of Appeal No. 77-3654, R. 1044. They are harvested largely by State sports fishermen. In addition, the harvest by the State to provide salmon and salmon eggs which it sells commercially are not counted in the State allocation; this harvest was valued at $580,000 in 1977.[295]

6. The number of fish caught on Indian reservations is negotiated between the State and the tribes. The State can challenge a tribal estimate in District Court if it feels it is inaccurate. As a practical matter, the negotiations, which are conducted under the auspices of the Court's Fisheries Advisory Board, have resulted in significant reductions by the Indians in the size of their on-reservation exclusion in return for various agreements from the State that benefit the tribes. *See, e.g.*, Fisheries Advisory Board Reports No. 78-73 and No. 78-79, September 11 and 25, 1978. Docket No. 5313. In 1978, for example, agreement was reached between the tribes and the State on the appropriate size of the on-reservation exclusion for all but

295. Washington Department of Fisheries News Release 78/074, Apr. 26, 1978.

two tribes. *Id.* The tribes have a strong incentive to bargain with the State because the State's hatchery programs are so susceptible to manipulation to the benefit or detriment of the tribes. The State has, therefore, been able to effectively use the negotiating process to prevent any of the type of on-reservation preemption about which this Court expressed concern in the *Puyallup* litigation.[296] Order On Certain Questions, Apr. 14, 1976, Joint App. at 458 (Question 3).

7. The tribal catch outside of usual and accustomed places is *de minimus*. *See* Summary of Commercial Sales of Salmon and Steelhead Landed by Treaty Indian Fishermen, Docket No. 2876, 5284.[297]

As will appear in greater detail below, the actual allocation decreed by the District Court is a careful and pragmatic accommodation of the rights of the Indian and non-Indian fishermen. While the traditional right of the tribes to fish at their usual and accustomed places is recognized, their treaty right is restricted to those places. The non-treaty fishermen, on the other hand, retain their mobility to seek the best available places in Puget Sound. In addition, substantial portions of the Washington landings, predominantly harvested by non-Indians, are excluded from the allocation since these fish do not return to the usual and accustomed places. Finally, in the IPSFC fisheries,

296. In addition, the District Court specifically ruled that neither the State nor the tribes may authorize fishing which would preempt the opportunity of the other. CL 20, 384 F. Supp. at 401, Joint App. at 195.

297. As a practical matter, these *de minimus* tribal catches were simply included in the tribal share when the District Court assessed the actual allocation in 1977. The 1975 Joint Salmon Catch Report, Docket No. 2787, which was filed in 1977, based treaty catches on data prepared by the U.S. Fish & Wildlife Service reports, as can be seen from Docket No. 2876, 5184, include tribal harvests in all regions, without regard to usual and accustomed places.

because of doubt whether the tribes have the fishing power to harvest their full share, the non-treaty fishermen have been given the opportunity to harvest the vast majority of the fish. The District Court's allocation, as applied to the fisheries, resulted in a total tribal catch comprising 18% of the total Washington harvest; the "50% plus" allocation referred to by the State is purely hypothetical.

B. *The District Court Correctly Utilized the Applicable Canons of Construction to Interpret the Stevens Treaties.*

1. The State's arguments completely distort the process of interpreting Indian tribes.

The State's distortion of the accepted methods of interpreting Indian treaties is remarkable. The construction of the treaties argued for is completely at odds with the facts, the well-established rules of construction governing Indian treaties, the language of the treaties themselves, and the prior case law concerning the treaties. The State's argument, if accepted, would cause a virtual preemption of the treaty right.

The State has also ignored the language and structure of the treaties themselves. The whole focus of its argument is on the legal effect of the modifying clause "in common with the citizens of the Territory." But, in its analysis, the State ignores the pivotal language of the treaties. What the treaties secure to the tribes, of course, is "the right of *taking fish* at all usual and accustomed grounds and stations." *E.g.*, Treaty of Medicine Creek, art. III, 10 Stat. 1132 (1854). The State reads the subsidiary clause "in common with" to completely deny the primary right reserved to the tribe—the right of *taking* fish. Such a construction makes little sense.

In a similar vein, the State argues that the treaty language dealing with off-reservation fishing rights refers to "said Indians" and to "all citizens of the Territory" indicating that the fishing rights were shared by individuals, not by the tribe and the United States as governmental entities. State's Brief at 39. An examination of the structure and language of the remaining portions of the treaties completely undermines the State's arguments.[298]

The first article of each of the treaties, as well as the articles of the treaties which deal with the setting aside of the reservation, both of which precede the reservation of the off-treaty fishing rights, speak of the contracting party as the "said tribes and bands," the "said tribes," or as "aforesaid confederated tribes and bands of Indians."[299] The phrase "said Indians" in the reservation of treaty fishing rights can only be understood in relation to the previous

298. *Cf.*, RESTATEMENT, CONTRACTS §235(c)(1932); RESTATEMENT (SECOND) OF CONTRACTS, §228(2)(Tent. Draft 1973) pointing out the fundamental rule of contract interpretation that documents should be interpreted as a whole and the different parts of an agreement can be accurately viewed only in light of all the other parts.

299. Article I of the Treaties of Medicine Creek, (Dec. 26, 1854) 10 Stat. 1132, Point Elliott, (Jan. 22, 1855) 12 Stat. 927, Point No Point, (Jan. 26, 1855) 12 Stat. 933 and the Quinault Treaty, (July 1, 1855) 12 Stat. 971, all provide:

> The *said tribes and bands* hereby cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows: . . . .

(emphasis added) Article I of the Yakima Treaty refers to the Tribes as "the aforesaid *confederated tribes and bands of Indians*," 12 Stat. 951, while the Treaty with the Makahs refers to "the said Tribe," 12 Stat. 939 (1855). Article II of each of the treaties deals with the creation of the reservation for the tribe and in each case reserves certain land either to "said tribe," to the "tribes and bands aforesaid," to the "aforesaid confederated tribes and bands of Indians," or to the "said tribes and bands." *Id.* Similarly, Article IV of the Point Elliott Treaty, Article III of the Point No Point Treaty, and Article III of the Makah Treaty, all of which precede the article on the off-reservation fishing right, refer to the tribes, not to individual Indians.

references to the "tribes and bands" contained in the treaties. In context, "said" means "before mentioned."[300] The reference to "said Indians" refers to "tribes" and, therefore, strongly undermines the State's contention that the treaty language was intended to secure a right to individual Indians rather than to the tribes.

The State's argument is also contradicted by the text of the Yakima Treaty, Article III of which provides in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to *said confederated tribes and bands* of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . .

(emphasis added). The Yakima Treaty unambiguously provides that the off-reservation treaty right is secured to the tribes. Since there is no evidence to support a conclusion that the United States intended the Yakima off-reservation treaty right to be secured to the Tribe, but to individual Indians of the other Washington tribes, the only logical interpretation is that "said Indians" in the other treaties refers to the "tribes."

The State and the Associations have even misapprehended the issue presented in interpreting the treaties. The question is not what the United States agreed to give the tribes, but rather the reverse. This Court placed the matter in proper perspective in *United States v. Winans*, 198 U.S. 371, 381 (1905):

> The right to resort to the fishing places in controversy *was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of*

300. BLACKS LAW DICTIONARY (Revised 4th ed. 1968). "This word is constantly used in contracts, pleadings and other legal papers, with the same force as 'aforesaid.'" *Id.*

> *impediment*, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, *the treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted*. And the form of the instrument and its language was adapted to that purpose.

(emphasis added) Similarly, in *Puyallup III* this Court, while recognizing that the Indian fishing right was to be shared with non-Indian fishermen, stated that "[a]s to the treaty Indians, this sentence effects a reservation of a previously exclusive right." 433 U.S. 165, 176, n. 16. *See also Winters v. United States*, 207 U.S. 564 (1908).

In order to interpret the meaning of the treaties, therefore, it is necessary to determine what the Indians agreed to give up and what they reserved to themselves. The argument by the Associations and the State that the tribes agreed to give up everything except their right to access to the water strains credulity and is completely at odds with the evidence regarding the negotiations. The Indians clearly regarded their fishing right to be of utmost importance in the negotiations and demanded and received assurances that it would be protected. As Dr. Lane summarized the anthropological evidence:

> [T]he Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but as owners of these rights, in the native way of looking at things, they were extending use rights to the non-Indians to share in the resources, but I don't think that they were giving up anything, or that they thought they were giving up anything.

Joint App. at 271-272.

A related distortion occurs because of the State's fixation on the language concerning the off-reservation fishing right, and its failure to consider this language in the context of the entire treaty negotiations. In order to appreciate the intended scope and meaning of this reserved right, some appreciation must be acquired of what the tribes ceded in exchange for this promise of the United States.

In the case of the Washington tribes, of course, the basic consideration to the United States was that the tribes cede the portion of Western Washington west of the Cascades. The United States was not dictating to these tribes as conqueror to the vanquished, but rather the tribes, as co-sovereigns, treated with the United States in friendship and in order to secure peace between the parties to the treaty. It is hardly to be supposed that the tribes voluntarily entered into an agreement under which they ceded the entire Puget Sound basin and the portions of the State west of the Cascade Mountains and reserved to themselves mere access to their usual and accustomed fishing grounds as the State suggests.[301] In light of the cessions in Article I of the treaties, such an interpretation would be to hold that the treaties were a fraud upon the Indians. In the State's discussion, however, all perspective of this is lost.

Perhaps most fundamentally, the State has lost sight of the spirit of the treaty negotiations. It must be emphasized that it was the United States, not the State of Washington, which negotiated the treaties. There is simply no indication in the record that the United States was motivated by the spirit of parsimoniousness which the State, in its analysis,

301. A recent article in the Seattle paper noted that the assessed valuation of King County alone was 21.5 billion dollars. Seattle Post-Intelligencer, Nov. 21, 1978, at A-4.

attributes to it. Rather, the evidence clearly indicates that the United States, consistent with its by then well-established duty toward Indian tribes,[302] treated with the tribes in good faith. Similarly, the evidence clearly indicates that the promises made by the United States to the tribes in the negotiations were accepted and relied upon.

Something of the flavor of the spirit of mutual good faith which permeated the negotiations can be gleaned from the following exchange recorded in the minutes of the negotiations for the Treaty of Neah Bay on January 31, 1855:

> The heads of the treaty had been adjusted and in the morning the Indians were again assembled—two additional sub-chiefs received papers. Viz: Tah-a-kowtl of Ozette and Kets-Knesum of the Stone House. The number of the whole tribe was found to be six hundred. Governor Stevens then addressed them:
>
> > My children—I have seen many other of my children before now. They have been glad to see me and to hear the words of the Great Father. I saw the Great Father a short time since and I since have to see you and give you his mind. The whites are crowding in upon you and in the Great Father wishes to give you your homes. He wants to buy your land and give you a fair price, but leaving you enough to live on and raise your potatoes. He knows what whalers you are, and how you go to sea, to take whales. He will send you barrels in which to put your oil, kettles to dry it out, lines and implements to fish with. The Great Father wants your children to go to school and learn trades and this will be done if we sign it. If it is good, I shall send it to the Great Father, and if he likes it, he will send it back with his name. If he wants it altered, he will let you know. When it is agreed to it is a bargain.
>
> The treaty was then read to them, interpreted clause by clause, and explained.

302. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12 (1831).

> Governor Stevens then asked if they were satisfied. If to say so—if not to answer freely and state their objections.
>
> Tse-Kaw-Wootl, brought up a white flag and presented it saying, *"Look at this flag, see if there are any spots on it. There are none, and there are none on our hearts."*
>
> Kalchote presented another flag. *"What you have said was good, and what you have written is good."*
>
> The Indians gave three cheers or shouts as each concluded. The Governor then signed the Treaty and was followed by the Indian chief and principal men.

Plaintiffs' Exhibit 16(b). (emphasis added)

In a similar vein, Governor Stevens made the following speech to the assembled tribes at the negotiations of the Treaty of Point No Point on January 26, 1855:

> Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not do for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a doctor to teach and cure you. Is not that fatherly? *This paper secures your fish.* Does not a father give food to his children? Besides fish you can hunt, gather roots and berries.

Plaintiffs' Exhibit PL-15, Joint App. at 330-331. (emphasis added)

The spirit which pervaded the negotiations as well as the actual evidence presented at trial concerning the understanding of the parties is inconsistent with an interpretation which would hold that the treaties are devoid of any present day significance and guarantee to the tribes no

more than does the Fourteenth Amendment. On one side, the treaties have been fully executed—the tribes have ceded their vast holdings in the State of Washington west of the Cascade Range and the State, as successor in interest to the United States, has received the benefit of that cession. Still, the State would deny the tribes the benefits of the consideration promised in return.

2. The proper focus of the process of interpreting Indian treaties as guided by the canons of construction

The State of Washington and the non-treaty fishing associations have both misunderstood the process of interpreting Indian treaties and misconstrued the District Court and Court of Appeals holdings. Both the State and the Associations attempt to characterize the District Court's interpretation as based purely on law. *See e.g.*, State's Brief at 42, Associations' Brief at 14.

In so characterizing it, and in directing rebuttal solely to the issue of what the United States negotiators must have meant by "in-common," the State has lost sight of the nature of the process of interpreting treaties. This process is not amenable to a simplistic labelling as law or fact but has attributes of both, as does the process of interpreting contracts generally. While the question of the meaning of language is clearly a question of fact, the courts have held that interpretation of a writing in contract law is the function for the court, not the jury.[303] Even in contract law, this process has a significant "legal" component because of the

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303. *See* 3 CORBIN ON CONTRACTS, §554 (1960); 4 WILLISTON ON CONTRACTS, §§601, 616 (3d ed. 1961).

application of rules of construction.[304] In Indian law, the canons of construction developed by this Court require that courts, when interpreting Indian treaties, exercise their judicial powers consistent with the canons and with the unique relationship of the tribes and United States.

The State's characterization that the District Court ruled as a "matter of law" while the Court of Appeals exercised "equitable discretion" is therefore neither accurate nor helpful. The State, in its brief, does not say one word about the application of these accepted canons of construction; to attempt to construe the treaties without the guidance supplied by these canons is to engage in an inquiry that lacks the particular focus it is required to have by federal law.

Although the canons of construction applicable to Indian treaties and statutes have been variously stated, their central purpose is clearly to insure the discharge of the Nation's trust obligation toward the Indians, first clearly articulated by Justice John Marshall in *Worcester v. Georgia, supra* and *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831), which compels action on its part consistent with the duties owned by a fiduciary. *See generally Seminole*

304. Professor Williston makes a useful distinction between "interpretation" and "construction." Interpretation, he argues, is the process of applying legal standards to expressions found in an agreement in order to interpret their meaning. Construction, on the other hand, is used to determine not the sense of individual words, but rather the legal meaning of an entire contract. "Construction" occurs whenever the import of the writing is made to depend upon a special sense imposed by the law. 4 WILLISTON ON CONTRACTS (3d ed. 1961) at §602. The process of construction, as defined by Professor Williston, is of central importance in interpreting federal Indian treaties because of the canons of construction consistently held applicable to Indian treaties since the early 19th Century. *See Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 582 (1832).

Nation v. United States, 316 U.S. 286, 296-97 (1942); *United States v. Kagama,* 118 U.S. 375 (1886).[305]

It is this trust responsibility which should give focus to the inquiry into the meaning of the federal promises regarding tribal off-reservation fishing rights to see that the promises of the United States are carried out. *See Tulee v. Washington,* 315 U.S. 681, 684-85 (1942).

Turning to the canons themselves, it is clear that the focal point of the Court's inquiry must be the understanding of the Indians. The fundamental rule that "treaties with Indians must be interpreted as they would have understood them" has been recognized and reiterated by the United States Supreme Court and state courts for nearly 150 years. Recently, the United States Supreme Court acknowledged the principle in *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 630 (1970), citing *Jones v. Meinan,* 175 U.S. 1, 10-11 (1899). And in another Indian treaty case, the Court stated:

> In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.

United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). *Accord, Worcester v. Georgia,* 31 U.S. 515 (1832); *Starr v.*

305. As the Supreme Court expressed it in *Kagama:*

> These Indian tribes are the wards of the Nation. . . . Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

118 U.S. at 383-384.

Long Jim, 227 U.S. 613 (1913); *Choctaw Nation of Indians v. United States*, 318 U.S. 418, 431-32 (1943).

The applicability of this rule to the treaties now before the Court was emphasized by this Court in *Tulee v. Washington*, 315 U.S. 681, 685-86 (1942):

> From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, *in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.*[306]

A somewhat different, but related rule of treaty interpretation, is that doubtful clauses are to be resolved in a non-technical way as the Indians would have understood the language. *Fleming v. McCurtain*, 215 U.S. 56, 59-60 (1909). This rule effectuates the rule that treaties be read as understood by the Indians who often could not read and who were not learned in the technical language used by the United States. As this Court stated in *Jones v. Meehan*, 175 U.S. 1 (1899):

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a writen language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by

306. (Emphasis added) In *Tulee*, the Court held that a licensing fee, even though it did not discriminate against Indian fishermen could not be reconciled with a fair construction of the treaty. *Id.* at 685.

> an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore, be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Id. at 10-11.[307]

In addition, and perhaps most importantly, the treaties must be interpreted and applied in a manner that implements their objectives. As this Court stated of its holding in *Winans, supra*, "[n]o other conclusion would give effect to the treaty." 198 U.S. at 381. *Winans* was followed and extended by this Court in *Seufert Bros. v. United States*, 249 U.S. 194 (1919). In *United States v. Rickert*, 188 U.S. 432, 438, 443-44 (1908), this Court construed a tax exemption in order to carry out the obligations assumed by the government toward Indians. *See also Squire v. Capoeman*, 351 U.S. 1, 9-10 (1956), holding that an implied income tax exemption was available to Indians to further a specific Congressional purpose. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court noted that the congressional purpose in creating the reservation for

307. These observations of the Court are particularly apposite in the instant case where the State and the non-treaty associations argue that the treaties should be construed according to a technical meaning. The State argues the words held at common law a construction that has the effect in the instant case of completely emasculating the treaty guarantees. On the other hand, as discussed elsewhere in this brief, the Indians clearly understood that the effect of the treaty language was to preserve to them a meaningful opportunity to fish so as to "provide a volume of fish which is sufficient to the fair needs of the Tribe." CL 20, 384 F. Supp. at 401.

the Metlakatla Indians was to assist and protect the Indians in their effort to train themselves to the habits of industry and become self-sustaining. *Id.* at 89. In order to further that purpose, the Court held that Congress must have necessarily, by implication, reserved the surrounding waters of the Annette Islands as part of the reservation in order to give them fishing grounds with which to support themselves. The Court arrived at this conclusion even though the statute made no mention of the surrounding waters or of the status of the Metlakatlans as fishermen.

Finally, treaties must be interpreted liberally consistent with the Nation's trust obligation and not to the prejudice of the Indians. This Court recently stated in *Antoine v. Washington,* 420 U.S. 194, 199 (1975):

> The canon of construction applied over a century and a half by this Court is that wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.

Similarly, in *Choate v. Trapp,* 224 U.S. 665, 675 (1912) the Court stated:

> The construction, instead of being strict, is liberal; doubtful expressions instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception for more than a hundred years. . . .

See also Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); *Seminole Nation v. United States,* 316 U.S. 286, 296 (1942); *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 174 (1974); *Morton v. Ruiz,* 415 U.S. 199, 236 (1974).

In its brief, the State argues that these canons of construction have, in effect, been superceded by this Court's

observation in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978):

> These instruments [treaties and legislation], which beyond their actual text form the backdrop for the intricate web of judicially-made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Id. at 206.

The State's argument, if accepted, would of course turn 150 years of Indian law on its ear. As the State would have it, instead of interpreting ambiguities in the treaty liberally in favor of the Indians, and instead of interpreting the treaty in the way that the tribes must have understood them, the treaty language should be interpreted according to the purported dictates of Kent's Commentaries, in a strict and technical legal sense. This is so, the State argues, even though this technical meaning was never communicated to the tribes and even though there was no evidence that the representatives of the United States had ever read Kent's Commentaries, or intended to use the words in a technical sense.[308]

It is hardly to be supposed that this Court, in *Oliphant,* intended to overrule, *sub silentio,* the body of case law concerning the interpretation of Indian treaties discussed above. Quite obviously, what the State has done, is to quote *Oliphant* language out of context and to misconstrue

308. In any event, as will be demonstrated below, the State has completely misconstrued the common law meaning of the phrase "in common with." Further, one of the more interesting and most glaring defects in the State's analysis is its failure to mention that Kent's Commentaries contains considerable discussion concerning Indian property rights and the relationship between the United States and the tribes. Many of the basic tenets of Indian law had, by then, already been established as "common notions of the day." *See* Section III-D, *infra.*

the Court's language. A careful examination of the *Oliphant* opinion confirms this conclusion. The Court in support of the quoted statement cites *Draper v. United States*, 164 U.S. 240, 245-247 (1896); *Morris v. Hitchcock*, 194 U.S. 384, 391-393 (1904); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965); and *DeCoteau v. District County Court*, 420 U.S. 425, 444-445 (1965). *Draper, Morris* and *Warren Trading Post* are not helpful on this particular point.[309] In *DeCoteau*, however, the issue presented was whether an Indian reservation had been terminated. The Court carefully preserved the essential role for the canons of construction as demonstrated by its careful consideration of the Indian's understanding. The Court concluded that the Indians themselves understood that the reservation would be terminated. 412 U.S. at 449. The Court noted that it did not lightly conclude that Indian reservations were terminated. It stated:

> The Congressional intent must be clear to overcome 'the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 quoting *Carpenter v. Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the 'Congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.' *Mattz v. Arnett*, 412 U.S. at 505.

309. *Draper* involved the question of whether the State of Montana or the United States had jurisdiction to try a non-Indian committing a criminal offense against another non-Indian on the reservation. The Tribe, therefore, was not directly involved. Though the Court relied on surrounding circumstances in *Morris v. Hitchcock* and *Warren Trading Post*, in both cases the legal issues were resolved favorably to the position of the tribes and the Court had no occasion, therefore, to consider whether reliance on surrounding circumstances was at issue with the ordinary canons of construction.

420 U.S. at 444. Where Indian understanding, as well as that of the government was clear, the "doubtful expression" canon could not be used to "create" ambiguity.

Moreover, it should be emphasized that in *Oliphant*, the treaty being interpreted by the Court was silent on the point at issue between the parties—whether tribes possess criminal jurisdiction over non-Indians. 435 U.S. at 191 (1978). This Court may have been reluctant to sanction a rule that would allow an Indian tribe to argue congressional silence on a particular issue, particularly in the absence of any clear indication of Indian understanding on the point, should be construed in favor of the position advocated by the tribe. This has no bearing on the situation now before the Court, however, where the treaty explicitly addresses the issue of the tribes reserved fishing rights and the only question is the interpretation of that language.

Moreover, the issue before the Court in *Oliphant*, was of a completely different character than the issue now before the Court. The question in *Oliphant* was whether the tribe retained inherent sovereignty to try criminally nonmember citizens of the United States for crimes committed against Indians, a matter already subject to the jurisdiction of the United States. The Court emphasized the basic criminal rights which would ordinarily be extended to any non-Indian offender for any crime to be tried by any State or federal court—guarantees, however, which were not applicable to the Indian tribes. The tribe's position competed strongly, therefore, with traditional inferences drawn concerning the availability of constitutional guarantees.

In contrast, the only issue now before the Court is the extent of the tribes' reserved property rights. Clearly, it is

not inconsistent with the status of Indian tribes, or with non-treaty constitutional liberties[310] that they should possess the treaty fishing rights declared by the District Court. Indeed, many of the cases discussing the canons of con struction deal with questions of Indian tribal property rights. *See e.g., United States v. Winters,* 207 U.S. 564 (1908); *United States v. Winans,* 198 U.S. 371 (1905); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Tulee v. Washington,* 315 U.S. 681 (1942); *Antoine v. Washington,* 420 U.S. 194 (1975); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973); *Choate v. Trapp,* 224 U.S. 665 (1912). Not only is there no tension between this reservation of rights and their status as tribes, but it appears from the evidence that this is the primary consideration upon which the tribes insisted in exchange for ceding their vast holdings.

C. *The Court's Decision Correctly Construed the Indian Treaties in Light of Their Purpose and Intent, and the Understandings of the Negotiators.*

In previous sections of this brief we have examineed the proper canons of construction which must be applied in this case. Treaties must be construed as a whole and so as to effectuate their purpose and intent as understood by the tribal negotiators. *See* III, B(2) *supra.* We turn now to an examination of the facts which were applied by the District Court and which support its decision. This review will show that not only was the decision well within the equitable discretion of the court, but that the court's decision was virtually mandated by the evidence concerning the execution of the treaties and the purpose and intent of the negotiators.

310. The equal protection argument raised by the State and Associations is without merit. *See* Part VII, *infra.*

To fully understand the purpose and intent of the treaties, it is necessary to understand three points: First, the taking and utilization of fish were at the very core of the cultural, religious and dietary existence of the Indians. Second, the taking and trading of fish formed the basis for a viable commercial Indian economy. Third, the treaty negotiators fully understood the central and predominant position of the right of taking fish and intended to preserve the Indian commercial economy and cultural way of life.

1. The paramount dependence of the Indian tribes on fish for their cultural, religious and dietary existence

The District Court found "almost universal and generally paramount dependence" upon the products of the sea to sustain the Indian way of life.[311] The Court noted that the native social organization reflected seasonal movements necessary to harvest the fish[312] and that the Indians had developed specialized techniques for harvest and storage which enabled them to utilize food as a dietary source throughout the year.[313] The Court found that the "first salmon ceremony" was celebrated virtually throughout the area as a religious rite to insure the continued return of the salmon.[314]

These findings were compelled by the evidence presented.

Dr. Lane noted that "throughout most of the area salmon (including steelhead where available)" was the staple

311. FF 3, 384 F. Supp. at 350, Joint App. 100.
312. FF 4, 384 F. Supp. at 350, Joint App. 100.
313. *Id.*
314. FF 6, 384 F. Supp. at 350, Joint App. 101.

food and the most important single food resource available to the native population,[315] a fact noted by the Indian agent, M.T. Simmons,[316] and by George Gibbs, the Secretary to the Treaty Commission.[317] The salmon harvest was taken by a variety of means and in a variety of areas with the Indians following the fish through their seasonal changes.[318] Fish were specifically noted to be a "staple" to the Quileutes,[319] the Yakimas,[320] and the Tulalips.[321] They were an "important" and essential element of diet to the Nisquallies,[322] the Puyallups,[333] the Sauk-Suiattles,[324] and the Skokomish.[325]

It is beyond question that fish were central to Indian religious beliefs. As the Court found, the first salmon ceremony was celebrated generally throughout the area and was essentially a religious rite to welcome and pay homage to the salmon and to insure their continued return to the area. It was thought that if the salmon were not treated properly they would become offended and cease to return to the stream where they had been improperly attended.[326] The religious rite was but a part of a wider conception of the interdependence and relatedness of all living things.[327]

315. Exhibit USA-20, Joint App., 366.
316. Ex. P.L. 40, at 577.
317. Ex. G-4, at 193-197.
318. FF 4, 384 F. Supp. at 351, Joint App. 100, and exhibits cited therein.
319. Ex. USA-22, at 13-14.
320. FPTO §3-102.
321. Ex. USA-92, at 21.
322. FF 82, 384 F. Supp. at 368, Joint App. 133 and evidence there cited.
323. FF 97, 384 F. Supp. at 370, Joint App. 138, FPTO §3-68.
324. Ex. USA-29, at 11.
325. Ex. USA-23, at 20.
326. Ex. USA-25, at 1, Joint App. 354.
327. Ex. USA-20, Joint App. 369.

It is likewise clear that fish were important in a broader cultural context. Thus the Nisquallies indentified star constellations by reference to fish and fisheries.[328] Fishing played a central role in Puyallup culture and the Puyallups lavished attention and concern on the salmon.[329] The Quileutes named months of the year for fish or fishing activities.[330]

And, of course, today, taking, preparing, eating and trading fish are still important functions for Indian communities. Fishing provides the basis for cultural identity and cohesive force in Indian society.[331]

2. The importance of fishing to Indian commerce and trade

The District Court found that fish constituted a major element of Indian trade and economy,[332] that intra-tribal trade was substantial[333] and that fishing increased preceding the treaties to accommodate increased demand for non-Indian consumption and for export.[334] There is no basis whatsoever in the record to dispute these findings.

Indian trade and commerce in fish was central to their way of life. Indians formed a very considerable proportion of the trade of the Sound.[335] Extensive trade was carried on in order to acquire not only food but raw materials and manufactured goods. This trade involved both necessities and luxuries.[336] At treaty times surplus food could be con-

328. Ex. USA-20, Joint App. 369.
329. Ex. USA-26, at 11.
330. Ex. USA-22, at 13-14; *see also* FF 105, 384 F. Supp. at 372, Joint App. 140.
331. Ex. USA-20, Joint App. 394.
332. FF 3, 384 F. Supp. at 350, Joint App. 100.
333. FF 7, *Id.* at 351, Joint App. 102.
334. *Id.*
335. Ex. P.L. 11, Joint App. 329.
336. Ex. USA-20, Joint App. 369.

verted to wealth. Distribution was effected through a complex exchange system.[337]

It was clear that Indians depended upon fishing for their livelihood and those fisheries could not be taken away without destroying them.[338] The Makahs, for example, used their preeminence in fishing to import many basic items such as canoe and house materials, they engaged in a wide trade up and down the cooast and were "emphatically" a trading people.[339] The Makahs had always ". . . as far back as knowledge about them goes, engaged in large-scale commercial fisheries, as producers, processors, and traders."[340] This trade allowed them to enjoy a high standard of living.[341]

After the treaties and in reliance thereon, the tribes continued to fish for commercial purposes.[342] This trade and commerce played an important part in the economy of the area as a whole with the Indians playing a central role in the business of the non-Indians.

The influx of settlers into the Territory increased the demand for consumption and export. Almost all of this demand, "including that for export, relied on Indians to supply the fish.[343] Smoked salmon was exported to China at 25¢ per pound. The business of securing that salmon had been done solely by the Indians.[344]

White traders at Neah Bay bought all the fish the In-

337. *Id.* at 369.
338. *Id.* at 374.
339. *Id.* at 401.
340. Ex. USA-21, Joint App. 409.
341. Ex. USA-21, Joint App. 415.
342. FF 31, 384 F. Supp. at 357, Joint App. 113-114.
343. Ex. USA-20, Joint App. 371.
344. *Id.* at 372.

dians could bring for sale.[345] Thus, it is beyond doubt that at and immediately subsequent to the treaties, Indian fishing and Indian trade in fish "formed an integral part of the pioneer economy."[346]

3. The purposes and intent of the treaty negotiators

Fishing then was clearly the single most important activity to Western Washington Indians. It was central to their diet, religion, culture, trade and commercial activities. It was, as this Court has noted, "not much less necessary" to their existence than the atmosphere they breathed. *United States v. Winans,* 198 U.S. 371, 381 (1905).

There can be no question that the treaty negotiators for both parties perceived its importance and intended to preserve it in the treaties.

The tribal negotiators, of course, understood the importance of fishing in the lives of their people and insisted that it be preserved through the treaty document. As the treaty negotiations it was noted that "all they keep talking about is their fisheries."[347] At this point, application of the canons of construction compels the conclusion that the District Court correctly construed the treaties.

The rules of construction dictate that: treaties are not to

345. *Id.* at 379.

346. *Id.*, at 393. We are incredulous at the State's misstatements regarding these matters. The State alleges that trade between Indians and non-Indians was ". . . inconsequential compared to the volume of the present day commercial salmon harvests" citing FF 7 and 8. (State Br. 28) Those findings say no such thing. FF 7 states that "*Intra*-tribal trade was substantial" but that it was "not possible to compare it" with present day volumes. As to trade with *non*-Indians the finding notes the central place Indian fishing played. FF 8 deals with the status of non-Indian commercial fishing.

347. Record in 9th Circuit Cause No. 74-2414, R. 1946, Joint App. 273.

be construed to the prejudice of the tribes; the terms of the treaties are to be carried out so far as possible in accordance with the meaning they were understood to have by the tribal representatives and not according to the technical meaning of words by learned lawyers; and they must be interpreted to carry out their purpose and intent. *See* discussion, Part III-B, *supra*.

Application of these canons to this case clearly supports a decision which insures the cultural and economic well-being of the tribes, since it is evident that both parties to the treaty had the same objectives and goals in mind. It will be recalled that federal law mandated that the treaty commissioners act in good faith. The Act of August 14, 1848, 9 Stat. 323, establishing the Oregon Territory, extended to that territory §14 of the Northwest Ordinance of 1787 (1 Stat. 51). The Act provided that "good faith shall always be observed toward the Indians." Supreme Court decisions compelled a similar fiduciary standard. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831). Further, there is no question but that the treaty commissioners understood the importance of fish in Indian culture as noted above:

> The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture, but also as a significant element of trade with the settlers.[348]

Given the Indian insistence on this point they could not have understood otherwise. For example, the treaty negotiators actively involved in the negotiations with the Treaty of Neah Bay (Makah) "understood the commercial value of the Makah fishery and the extent of the Makah trade with whites."[349] There was no intent to prevent the

348. Ex. USA-20, Joint App. 382.
349. Ex. USA-21, Joint App. 415.

Indians from using fisheries for economic gain.[350] At Neah Bay, Governor Stevens told the Indians that far from wanting to stop their fisheries he wanted to send them more modern apparatus to help them.[351] Not only was there no intention of creating a class society with the Indians on the bottom of the economic rung, but the treaty commissioners clearly wanted to provide the Indians a means of participating and prospering in the economy of the territory.[352] The promises made to the Makahs, for example, can only be seen as related to commercial development.[353]

The State's own anthropologist testified that the treaty commissioners did not contemplate that the Indians would be restricted in their fishing.[354] As Governor Stevens told the Indians gathered at Point No Point, "this paper secures your fish."[355]

It seems clear then that the treaty commissioners pursuant to their instructions to deal honorably with the Indians not only properly *perceived* the importance of fishing to the Indians but also *intended* to preserve that importance in the treaty documents:

> The right of *taking fish,* at all usual and accustomed grounds and stations, is further secured to said Indians. . . . (emphasis added)

Construing then, the treaty as a whole as to its purposes and objectives, it is clear there was a "meeting of the

350. *See* FF 21, 384 F. Supp. at 355, Joint App. 109, and sources cited therein.
351. Ex. PL-16(b), Joint App. 331.
352. Ex. USA-20, Joint App. 396.
353. Ex. USA-21, Joint App. 416.
354. Record in 9th Circuit Cause No. 74-2414, Tr. 2381.
355. Ex. PL-15, Joint App. 331. The State's allegation that the treaty commissioners proposed that the Indians have the right to leave their reservations only for "the limited purpose of seeking food" (State Br. 44) is directly contradicted by the evidence.

minds" between the two parties to the treaty to the effect that the right of fishing must be secured to the Indians in order to preserve their way of life and economy in return for their relinquishment of their other rights and property.

4. The meaning of the phrase "in common with"

The general purpose of the treaty reservation of fishing rights was to secure the fishing right to the Indians so that they might maintain their way of life. The State argues, however, (State Br. 42-61) that the words "in common with" are a limiting concept designed to limit the treaty fishers to fishing simply the same as all other citizens, that is, subject to State laws and controls for whatever purposes.

There is absolutely no support for this contention in the record. To the contrary, the evidence establishes that the fishing rights phrase and in particular the words "in common with" did not bear the meaning suggested by the State to either party to the treaty.

We think it now clear beyond any further argument that the most likely interpretation of the fishing rights phrase to the Indians was simply that they would relinquish their heretofore exclusive control of fishing and extend "use rights" to the non-Indian citizens but that there would be no restrictions on their fishing and they would continue to fish for their needs.

> The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture, but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue—the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the territory. I believe that both parties intended the Indians to continue full use of their fishing places. . . .[356]

At most the Indians were agreeing to share the waters of Puget Sound with the non-Indians.[357] The Indian concepts of ownership were highly developed and allowed the Indians to extend "use rights" to others.[358] The Indians were clearly concerned with retaining "their ownership over the fishery resource."[359] As owners of those resources the tribes understood themselves to be fully reserving their previous powers to determine the priorities of uses as between themselves and the non-Indians. *See* Joint App. 277. The tribes were clearly *not* agreeing that developing non-Indian fisheries would be allowed to interfere with continued tribal fishing as the basis of tribal economy. *See* Joint App. 383. As Dr. Lane concluded:

> [T]he Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but that as owners of these rights, in the native way of looking at things they were extending use rights to non-Indians to share in the resources, but I don't think . . . they thought they were giving up anything.[360]

It is also clear that the federal negotiators were thinking along these lines. Governor Stevens noted in response to expressions of concern by the Indians that "this paper secures your fish." Ex. PL-15, Joint App. 351. Dr. Lane testified that the "in common with" language must have been understood and intended to assure non-Indians an opportunity to fish but not at the expense of Indian claims and rights and that it was intended to allow non-Indians to

356. Ex. USA-20, Joint App. 382.
357. Lane testimony, Joint App. 284.
358. *Id.* at 260.
359. *Id.* at 271.
360. *Id.* at 271-272.

fish subject to prior Indian rights. Ex. USA-20, Joint App. 396-97. The State's own anthropologist testified that the treaty commissioners had no thought that the Indians ever would be restricted in their fishing.[361]

Thus both the United States negotiators and the tribal negotiators intended that Indian fishing would continue as it had before the treaties: non-Indians would also have access to the Indian fisheries, but without interfering with the continued pursuit of traditional Indian fishing.[362]

This then is the most likely meaning of the fishing phrase: that the Indians would continue to fish as they had before unmolested and without surrender of any of their ownership rights, but that they would extend use rights to the non-Indian settlers who could also share the fishery.

Certainly the least likely possibility is that put forth by the State, *i.e.*, that the Indians would fish subject to the same controls and conditions as the non-Indians in the same way that one might pasture a horse on the commons.[363]

Further, such an interpretation would completely undermine the basic understandings about the treaty, noted above, that the Indians would have their fish secured so that they might continue their way of life. Their civilization was totally dependent upon fish for diet, religion and culture. Their economy, which allowed most of them a relatively high standard of living, was based on commerce in fish. To presume that the tribal negotiators were sur-

361. Record in 9th Circuit Cause No. 74-2414, Tr. 2381.
362. Ex. USA-20, Joint App. 383; *see* FF 26, 20, 384 F. Supp. 357, 355, Joint App. 112, 109.
363. *See* Lane testimony, Joint App. 281.

rendering their fisheries so that they would fish "on the same basis" as all other citizens subject to the control of a territorial government in which they had no vote is preposterous.

Moreover, such a concept would be completely incompatible with the Indian concepts of ownership and use rights noted previously.

Finally, the possibility that the fishing clause and in particular, "in common with" meant a 50-50 or equal sharing between the two parties to the treaty, remains to be examined. Although, as we have noted, the more likely understanding was that the Indians were simply relinquishing exclusive fishing rights, it is possible that the concept of equal sharing was discussed.

While there were no words in the Chinook jargon for "common" or "with", there were words for "half" (sit'-kum), and "fish" (pish).[364] Thus presumably, it would have been possible for the negotiators to have discussed concepts of dividing the fishery in half.

At least one set of tribal negotiators appeared to have used the language "in common with" to mean one-half. At the Treaty of Neah Bay *Ka-bach-sat* of Tso-yess stated:

> I do not wish to leave all my land. I am willing you should *have half*, but I want the other half myself.[365]

(emphasis added)

In response to *Ka-bach-sat's* speech, another head man, *It-an-da-ha* of Waatch responded:

> My wish is like the rest, I do not wish to leave the saltwater. I want to fish *in common with* the whites.

364. *See* Ex. Y-21.
365. Ex. PL-16(b) at 3.

> I don't want to sell all the land. I want a part *in common with* the whites to plant potatoes on.[366] (emphasis added)

Thus, *Ka-bach-sat* and *It-an-da-ha* appeared to be using the phrase "in common with" to connote one-half, albeit focusing more on "land" than "fish".

Subsequent to the negotiations of the treaties, we also find S. S. Ford, a participant in the Fox Island Council proceedings, as representing that the government was offering the Indians ". . . for fishing privileges, one-half of the rivers and Sound. . . ."[367]

At the negotiations of the Point-No-Point Treaty a Skokomish elder, *One-lun-teh-tat*, also spoke of the concept of one-half:

> I wish to speak my mind as to selling land great chief! . . . I don't want to sign away all my land, take half of it, and let us keep the rest.

To the same effect spoke another chief, *Hool-hole-tan*:

> I don't want to sign away my rights to the land . . . let us keep half of it. . . .[368]

At the negotiations for the Quinault Treaty two Chinook chiefs, *Nah-Kot-ti* and *Moos Moos*, utilized the concept of one-half in discussing salvage rights:

> When anything came ashore on the weathered beach, whales or anything, they wanted one-half . . .[369]

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366. *Id.*

367. Fox Island Council proceedings, Executive Order of January 20, 1857, Executive Order File 1850-92, Records of the Bureau of Indian Affairs, Record Group 75, National Archives. (This item is not in evidence.)

368. Ex. PL-15 at 2-3.

369. Ex. PL-17(c) at 1(g).

> On another day of the negotiations, *Nah-Kot-ti* also spoke of surrendering half of his salvage rights to the whites: . . . on the beach [he] would give up half he found.[370]

These tribal negotiators were familiar with the concept of one-half in terms of surrendering their currently existing rights, and in the case of the Makah negotiators, used the term "half" synonomously with the phrase "in common with".

Thus a review of the evidence strongly supports the concept that the tribal negotiators thought they were at most surrendering exclusivity to fishing, agreeing to extend use rights to the non-Indians and agreeing to share the fish with those citizens. They would continue to take all the fish they needed or wanted.

There is *some* support for the idea that the tribal negotiators may have been understanding an equal sharing in the sense of a 50-50 split with the citizens of the Territory. That is the very *least* they were guaranteed.

There is absolutely *no* support whatsoever for the State's concept that the Indians were agreeing to fish on exactly the same basis as non-Indian citizens, to be subject to controls of the territorial or state government as it evolved, to have their fishing gear and methods outlawed, or to have their fishing rights prempted by prior fisheries.

Nor is there any support in the facts or the "legal milieu" for the State's contention that the words "in common with" had a specific legal meaning contemplated by the federal negotiators. This point will be discussed more thoroughly below.

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370. *Id.* at 1(o).

D. *The State's Argument that the 19th Century "Legal Milieu" Demonstrates a Government Intention to Limit the Tribal Treaty Right to a Mere Right of Access to the Fishery and the Right to Compete Individually with Non-Indians Must be Rejected.*

1. The State misinterprets the common law fisheries rights. To the extent of their relevance, the common law tends to uphold the lower court decision.

As noted in Part III(B), *supra,* the central focus of the inquiry into the meaning of the treaties must be upon the understanding of the tribes, not upon whatever uncommunicated concepts the United States representatives may have had. The State's speculations concerning what concepts of incorporeal hereditaments the federal negotiators may have held consistent with the contemporary status of the common law are quite simply irrelevant.

More importantly, the previous section demonstrates that, in actual fact, the tribal insistence that their fishing rights be preserved was repeatedly communicated to the federal negotiators and agreed upon. The message conveyed by Governor Stevens, in turn, was "this paper secures your fish," a specific communication of the federal negotiators' agreement which must supercede the State's speculations. Finally, not the least of the defects in the State's analysis is the fact that it has completely misconstrued the common law concerning fisheries in 1855.

The State contends that the treaty language was intended to create a "common fishery," State's Br. at 48-56, a common law term which described the "right of the public to fish in waters not apportioned as exclusive waters." S. A. Moore, *The History and Law of Fisheries,* 34-36 (1903); 3 J. Kent, *Commentaries on American Law,* Part VI, at 410 (5th ed. 1844). In Great Britain, the term referred to the rights of all British subjects to fish in the areas of the sea and navigable rivers which are not subject to any specific grant, pursuant to the regulation of the sovereign. S. A. Moore, *supra,* at 34-36.

However, the word "common" was also used in the common law to describe a "common *of* fishery," which was quite different than a "common fishery." 2 W. Blackstone, *Commentaries* §34 (14th ed. 1803), 3 Kent, *supra,* at 410. A "common *of* fishery" was the non-exclusive right, acquired by grant, "of taking fish *in common with* certain others in waters flowing through another's (sic) man's land." J. Gould, *On A Treatise On The Laws Of Waters,* §183 (3d ed. 1900). (emphasis added) Gould distinguishes a "common fishery," on the other hand, as one *not* tied to a particular stream or fishing area. *Id.; see also* 2 H. Farnham, *Waters and Water Rights,* §379 (1904).

The treatises also mention two other types of fisheries, "free," and "several," but the most certain conclusion one can draw from review of these treatises and the common law background is that these four fisheries were often confused.[371] The State argues that even the United States Solicitor General himself confused the "common of" and "common" fisheries. State's Brief at 50, n. 28. *See also* 3 Kent, *supra,* at 409-410.

The phrase "in common with," was used to describe attributes of both "common fisheries" and "common *of* fish-

371. Several authorities hold that a free fishery is the same as a common fishery. J. Gould, *supra,* §183; 2 Farnham, *supra,* §379, ("A free fishery is merely the right to fish in a certain place *in common with* all others who may have a right to fish there, and is the same as an unlimited common of fishery.") (emphasis added)

eries," and these rights themselves were the subject of much confusion.

The State's contention that the words "in common with" created a "common fishery," however, can be completely discounted. To the extent these common law principles are relevant at all, it is clear that the attributes of a "common *of* fishery" are much closer to the demonstrated intentions of the treaty parties, than are the attributes of a "common fishery." While there was no question that fishing rights in public waters could be granted away by the sovereign body, Gould, *supra*, §36; 2 Farnham, *supra*, §368a,[372] a "common fishery" was, by definition, a right to fish in open waters *not* subject to any grant of alienation. 3 Kent, *supra*, at 412. The right which the grantee would receive would clearly not be a "common fishery," but rather, depending on its terms, a "common *of* fishery," a free fishery or a several fishery. The treaties were grants of fisheries by the tribes to the United States on behalf of its citizens. *See United States v. Winans*, 198 U.S. 371 (1905). But lacking any common law precedent to create a "common fishery" by grant it is unlikely that it was the intention of the parties to do so.[373]

Further, a "common fishery," by definition, was the right of the public to fish in all public waters not restricted to any particular place. 2 H. Farnham, *supra*, §379; Gould, *supra*, §183. The treaties, however, specifically limited the

372. The right of the *king* to grant fisheries in public waters was foreclosed by the Magna Charta, but this limitation did not extend to Parliament nor to the United States, which succeeded to the powers of both King and Parliament. 2 Farnham, *supra*, §§368a, 370. The right of the legislature, directly or through a subordinate body, to grant fishing rights in public waters in uncontroverted. 2 Farnham, *supra*, §370.

373. In fact, at common law, "the unorganized public," could not acquire fishing rights either by grant or prescription. 1 C. Kinney, A Treatise on The Law of Irrigation and Water Rights, §364 (2d ed. 1912).

tribal treaty rights to "usual and accustomed" grounds. As many writers have noted, it is the limitation of the fishing right to a specific place which distinguishes a "common *of* fishery" from a "common fishery." *E.g.*, J. Gould, *supra*, §183. The reservation by the tribes of a "common fishery" at specific usual and accustomed places would be a contradiction in terms.

Moreover, the rights to a "common fishery" did not include a right of easement to get to the fishery. As stated by Lord Kent, "[i]t is everywhere agreed, that this common right is liable to be modified and controlled by the municipal law of the land, and no person has a right to pass over the lands of others in order to get to the water." 3 Kent, *supra*, at 413. As the State admits, however, *United States v. Winans* held that the treaties guaranteed a right of access. The common law concept of a "common fishery" is, therefore, inapposite.

On the other hand, certain attributes of a common law "right of commons" are present in the treaty reservation. A "common *of* fishery" was capable of transfer; it could be acquired by grant or prescription. 3 Kent, *supra*, at 413; J. Angell, *A Treatise On Water Courses*, §79 (6th ed. 1869). It is tied to a particular location, 2 Farnham, *supra*, at §379, and, included an easement right of access over private lands to the fishing location. 2 Farnham, *supra*, §373. And, most important for present purposes, it was subject to apportionment.[374] It was also recognized that a

374. A "common *of* fishery" is merely one of a number of rights of common. W. B. Edwards, A Compendium of the Law of Property in Land and of Conveyancing Relating to Such Property, 231 (5th ed. 1922). The commentaries on rights of common agree that such rights could be apportioned up to the extent of the grant. Edwards, *supra*, at 234; H. W. Woolrych, A Treatise of the Law of Rights of Common, (2d ed. 1850) at 125-26. 3 H. Tiffany, Real Property, §847 (3d ed. 1939).

holder of "common *of* fishery" rights could not interfere with the rights of another "commoner," Gould, *supra*, at §§185-187, a principle certainly at odds with the non-treaty preemption of the treaty opportunity.[375] In sum, neither Kent, nor the other commentators support the attenuated analogy the State draws with the 19th Century common fisheries. If Gibbs did have a particular meaning in mind, it is not the limited version the State suggests. What is more likely is that he used the phrase as it was used in other treaties of the United States—a point which will be discussed in part 3 below.

2. Tribal sovereignty and the trust responsibility of the United States were well-established concepts at treaty time and part of the legal milieu.

Although there is much to criticize about the State's discussion of the "legal milieu" surrounding the negotiation and execution of the Stevens treaties, most conspicuous is the omission of any mention of the law governing the relations between the United States and the Indian tribes. By 1854, of course, many aspects of this relation had been settled, including both the status of the tribes as domestic dependent sovereigns, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and the trust responsibility owed by the United States to the tribes. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).[376] And, as noted

375. *Compare* Gould *supra*, §187, regarding the prohibition on owners of fisheries downstream in non-navigable rivers from fishing out the river in derogation of rights of upstream fishery owners.

376. As Justice Marshall stated:

> Meanwhile, [the tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

Cherokee Nation v. Georgia, 30 U.S. at 17.

above, it was in *Worcester v. Georgia* that the Supreme Court first articulated the fundamental postulate that ambiguities in federal treaties or statutes dealing with Indians must be resolved favorably to the Indians. 31 U.S. at 582.

One of the ironies presented by the State's reliance on the 5th edition of Kent's Commentaries to support their technical interpretation of "in common with," is that Kent's previous chapter contains an extensive discussion of the principles of Indian law already articulated by the United States Supreme Court in 1844. *See generally*, 3 *Kent's Commentaries* at 377-400 (5th ed. 1844). Included in Kent's Commentaries are extended references to *Cherokee Nation* and *Worcester*. Kent noted that the Cherokee Nation had been recognized by the United States as a "nation," to which the United States pledged protection. *Id.* at 381-382. Kent described the holding of the Supreme Court regarding the status of Indian land tenure in *Cherokee Nation* and noted that "discovery" conferred rights on the European powers only among themselves. He continued:

> [I]n respect to the Indians, it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper, so far as the rights of the natives were concerned.

Id. at 383 (footnotes omitted). Kent also described at length the Court's holding on the sovereign status of the tribes in *Worcester*. *Id.*

Regarding the policy of the United States government towards the Indian tribes, Kent stated:

> The government of the United States, since the period of our independence, has pursued a steady system of pacific, just and paternal policy towards the Indians,

> within their widespread territories. It has never insisted upon any other claim to the Indian lands, than the right of preemption, upon fair terms; . . . The efforts of the national government to protect the Indians from wars with each other, from their own propensity to intemperance, from the frauds and injustice of the whites, and to impart to them some of the essential blessings of civilization, have been steady and judicious and reflect lustre on our national character.

Id at 398-399.[377]

If one accepts the State's conclusion that Governor Stevens and Gibbs were erudite enough to have been familiar with Kent's discussion of incorporeal hereditaments, they must have been also familiar with the section of the *Commentaries* specifically addressed to the negotiation of treaties with the tribes to extinguish Indian title. Similarly, they must have been familiar with the law concerning the status of Indian tribes as domestic sovereign nations and the trust responsibility owed by the United States to the tribes. As described below, even today, the sovereign status of tribes forms the "backdrop" against which treaties must be construed. This backdrop provides strong support for the decision below. *See* Part III E, *infra*.

3. The United States' contemporaneous interpretation of "in common with" in treaties between the United States and Great Britain supports the conclusion that the United States intended a reservation to the tribes of an equal apportionable share of the fisheries.

In 1818, after several months of negotiation, the United States and Great Britain entered into an agreement which

377. In describing the policies of the colonial government toward the tribes, Kent noted particularly that the Massachusetts legislature, in 1633, recognized the Indian right to enjoyment of their hunting and fishing places and declared that they should have relief in any of the courts as the English have. *Id*. at 391.

provided in part:

> It is agreed between the high contracting parties, that the inhabitants of the said United States shall have, forever, ***in common with*** the subjects of his Brittanic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Quirpon Islands. . . . (emphasis added)

Treaty of Oct. 20, 1818, United States—Great Britain, 8 Stat. 248, Treaty Series No. 112. Agreements regarding those fisheries which used the "in common with" language were also entered into in 1854, Treaty of June 5, 1854, United States—Great Britain, 10 Stat. 1089, Treaty Series No. 124, and in 1871. Treaty of May 8, 1871, United States—Great Britain, 17 Stat. 863, 12 Treaties and International Agreements 171.[378] The position taken by the United States with respect to the rights created by these agreements strongly supports the contention that the United States intended that the tribes reserved the right to an opportunity to an equal share of the fishery at their usual and accustomed places.[379]

United States officials throughout the 19th Century interpreted the rights conferred by the Northeastern Atlantic Treaties as apportionable shares in the fishery, compensable if interfered with, and specifically referred to the right as a tenancy in common. At the time the United States and Britain entered into the Treaty of 1818, France was claiming *exclusive* rights to fish in those same areas by virtue of a previous grant from Great Britain. In 1823,

378. These later treaties were in force only for short periods of time.

379. Two caveats are necessary. First, the analogy between the two situations is not complete. Although the United States treated with the tribes as with foreign sovereigns, the relationship between the United States and the various tribes was unlike the relationship between the United States and Great Britain in several key respects. The tribes were

[Footnote 379 continued on next page.]

John Quincy Adams, then Secretary of State, wrote to Honorable R. Rush, Minister of the United States to Great Britain, regarding this claim. He requested that Mr. Rush inform Great Britain that while they supported their claim against France,

> . . . if the British Government admits the claim of France to *exclusive* fishery . . . *they will necessarily see the obligation of indemnifying the United States by an equivalent for the loss of that portion of the fishery, expressly conceded to them by the convention,* which, in the supposed hypothesis, must have been granted by Great Britain under an erroneous impression that it was yet in her power to grant.

5 Am. State Papers (For. Rel.) 528-529 (emphasis added). Mr. Adams on another occasion referred to the United States' rights to "an equal share" in the fishery. J. Q. Adams, *The Fisheries and the Mississippi,* 184 (1822).

Mr. Adams' view that the 1818 treaty language "in common with" gave to the United States a specific compensable "share" or "portion" of the fishery is in vivid contrast to the State's position that the Indian treaties gave to the tribes merely *access* to a "common fishery," a fishery for which the loss would be non-compensable.[380]

"domestic dependent sovereigns" of the United States, to whom the government owed fiduciary obligations. Further, the economic and social situation of the tribes regarding their fisheries was completely different from that of the United States and Great Britain and the "states of mind" of the parties to the Indian treaties were probably quite different than those of the parties to the Northeast Atlantic Fisheries Treaties.

Second, the major bone of contention between the United States and Britain was whether Great Britain had any power to regulate United States fishermen. The allocation of the resource was simply not a problem. Nevertheless, the interpretation given to the words "in common with" by the United States in those treaties provides a more apt analogy than "common fisheries."

380. It is clear that a state can abridge or remove the public's fishing right in state waters without compensation. It is equally clear that tribal treaty rights to fish "in common" are compensable. *Whitefoot v. United States,* 293 F.2d 658, 155 Ct. Cl. 127 (1961), *cert denied,* 369 U.S. 818 (1962). This is an additional indication that the right reserved by the tribes was not merely a right to the "common fishery."

The United States' position was affirmed in 1878 by another Secretary of State. In connection with a regulation conflict with Great Britain, Secretary William M. Evarts, wrote to the President regarding the rights of the United States under the Treaty of 1818 as follows:

> Whatever this fishery was in its natural extent and value, in its geographical area, and its multitude and variety of fish products, that was the subject of which Great Britain possessed the *jus disponedi,* and that the subject of which the United States proposed to acquire an undivided share. *The proportion of this fishery which Great Britain was to part with and the United States was to appropriate does not affect the question of what the entire property was and was understood to be.* Whatever the United States would have acquired had Great Britain parted with the whole fishery, *the subject partioned between them was this entirety, no matter what the shares in which it was to be enjoyed might be.*

H. Ex. Doc. No. 84, 46th Cong., 2d Sess. 1881, at 7 (emphasis added).

> There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of *either's share of the common fishery* . . . thus disabling either government from impairing the share of the other by introducing foreign fishermen into the common fishery.

Id. at 8 (emphasis added).

It should be reiterated that the specific allocation of the Northeast fisheries was not at issue when these views were propounded. The United States throughout this period was simply rejecting the British view that the rights which the United States acquired by virtue of the "in common with" provision were only rights to access and opportunity to the fisheries limited by whatever Great Britain allowed her own subjects. These views, however, particularly when

seen in light of the entire background of the 1818 treaty, show that the United States considered it held an approtionable equal share in the fishery.

In addition to the specific official interpretations noted above, the background of the 1818 Treaty indicates that its intent was to preserve for the United States a "tenancy in common" in the subject fisheries. After the War of Independence, in 1783, the United States and Great Britain entered into a treaty under which the inhabitants of the United States reserved fishing rights in certain areas around Newfoundland. Treaty of 1783, Art. 3. The rights "reserved" were described as a "tenancy in common" by Secretary of State Livingston, in a letter to Dr. Franklin in 1782. 9 *Franklin's Work* (Sparks ed.), 135, cited in 3 *Wharton, International Law Digest* §301 (1886). Wharton, a leading authority on International Law, in describing the 1818 Treaty negotiations also states:

> The British commissioners were aware of the American claim:
>
> (1) That the fisheries were conquered from France in a large measure by the colonies.
>
> (2) That they were held by the colonies in common with the parent country, and that *this tenancy in common*, from the fact that the colonies were endowed at the time with distinct local government, made the fisheries, in such tenancy, the appurtenances of the colonies as distinct political entities.
>
> (3) That this tenancy in common was recognized by the Treaty of Peace of 1783, and the same rights in the fisheries were assigned to the United States (incorporating as they did the colonies) as were assigned to Great Britain, the United States continuing to enjoy these fisheries in common with Great Britain.

3 *F. Wharton*, supra, §304 (emphasis added). He also states that the Treaty of 1818 "recognize[d] the existence

of these territorial rights and affirm[ed] their continuance," 3 F. Wharton, *supra*, §304.[381]

Perhaps the most erudite description of the inclusion in the Treaty of 1818 of the words "in common with" was given in 1910 in a brief on behalf of the United States in an arbitration proceeding before the Hague.[382] The brief discussed the reasons for the inclusion of those precise words as follows:

> The American negotiators had declared that whatever extent of fishing ground might be secured to American fishermen, they were not prepared to accept in a tenure or on conditions different from those on which the whole had theretofore been held, and to evidence that the right taken was on the same tenure and conditions as the prior right, they proposed and insisted on inserting in the treaty, the renunciatory clause therein found, with the twofold view of preventing any implication that the fishery secured was a new grant and of placing the permanence of the rights secured and of those renounced on the same footing, and also of expressly stating that the renunciation extended only to the distance of three miles from the coast.
>
> Their [the words 'in common'] desirability suggested itself to the British negotiators, no doubt, when preparing the draft finally agreed on, as a safeguard against any implication of an exclusive right in the United States, *and also to prevent the crowding out by American fishermen of the British fishermen, of which Lord Bathurst had complained and which was in effect the practice of an exclusive fishery, and they were accepted by the American negotiators as proper for that purpose, and also as desirable from their*

381. Ordinarily, of course, when title to property is held by two or more tenants in common, and the fractional part is not specified in the transfer document, equal shares are presumed. 2 AMERICAN LAW OF PROPERTY, §6.5; 2 TIFFANY, REAL PROPERTY, §426 (3d ed. 1939).

382. The entire proceeding is contained in S. Doc. No. 870, 61st Cong., 2d Sess., Volume 1-12. The Brief for the United States is in Volume 8.

> *standpoint, for the further purpose of fixing beyond question the equal measure and quality of right in the fisheries for which they were contending.*

S. Doc. No. 870, 61st Cong., 2d Sess., Vol. 8 at 46-47. (emphasis added; footnotes omitted).

The United States was concerned with preserving the same rights they previously had, the tenancy in common created by the partitioning Treaty of 1783. The British negotiators felt, and the United States agreed, that the provision "in common with" would prevent any practical crowding out of British fishermen by an excess of Americans, and would guarantee "the equal measure and quality of right in the fisheries for which they were contending." The precise situation which the British and American negotiators *intended to prevent*, by including the words "in common with"—the practical diminishment of the equal measure and quality of the fishing right by the entrance of an excessive fishing effort by one party, is exactly what the State of Washington contends was *intended* by the inclusion of those same words in the Indian treaties. Such a contention cannot be sustained.

The words "in common with," used in fishing treaties between Great Britain and the United States, as interpreted by the United States and numerous commentators, guaranteed to the parties an equal measure or proportion of the fishery, and insured against any diminishment of that share by an increased fishery effort of one party. The treaty was so interpreted by three United States Secretaries of State, several commentators, and a brief of the United States government in an action before an International Court in 1910. Further, the origin of those treaties as an outgrowth of a partition of fisheries between two equal sovereigns supports this position.

Finally, the State's proposed interpretation of the "in common with" provision was specifically rejected by the United States throughout the late 1800's and early 1900's, in the context of denying the right of Great Britain to regulate American fishermen under the Treaty of 1818. The position of the British government, at least as viewed by the United States, was that the words "in common" granted to the United States the right to fish in "the manner, or means, or times of fishing, which the grantor himself might employ." Brief of United States, North Atlantic Coast Fisheries Arbitration, S. Doc. No. 870, Vol. 8, *supra*, at 41. Similarly, the State of Washington contends that the words "in common" in the Indian treaties convey the same meaning—the tribes may fish alongside non-Indians whenever and however non-Indians are entitled to fish. This view, however, was emphatically rejected by the United States:

> This Government conceives that the fishery rights of the United States conceded by the Treaty of Washington, are to be exercised wholly free from the restraints and regulations of the statutes of Newfoundland.[383]

Mr. Evarts, Secretary of State, to Mr. Welsh, February 17, 1879, *cited* in 3 F. Wharton, *supra*, §308.

The dispute over regulation was submitted to the Permanent Court of Arbitration at the Hague in 1909.[384] In

383. This is remarkably identical to the District Court's Findings of Fact concerning the Tribes' understanding of their rights in the fisheries, FF 26, 384 F. Supp. at 357, Joint App. 112, and to Dr. Lane's testimony that the Indians believed they would never be controlled in their fishing by any non-Indian government. (Record in 9th Circuit Cause No. 74-2414 Tr. 1875, 1963) To the extent there was a "meeting of the minds," at the Treaty negotiations, it was most likely an understanding that there could be no interference in the rights.

384. The court did not completely adopt the position of the United States. However, it is the *intent* and *understanding* of the *United States* with which we are concerned here.

briefing the issue, the United States took the position that

> . . .*[t]here is no permissible use of the words* from which can be gathered an intention to limit the fishery right granted, to the manner, or means, or times of fishing, which the grantor himself might enjoy.

(emphasis added) *Id.* Arguing that such an interpretation of the treaty provision was inconceivable, the brief also argued:

> If it could be thought that the British negotiators had such a result in mind it is impossible to conceive that the American plenipotentaries would have accepted a fishing right so empty and valueless.

Id. If the State of Washington's contentions were upheld, the tribes' treaty guarantees would be equally "empty and valueless." That such a result could have been intended by either the tribes or the United States is similarly inconceivable.

E. *The District Court's Allocation Is the Minimal Allocation That Can Be Sustained Consistent With the Evidence, the Canons of Construction, and the Prior Decisions of This Court.*

In light of the argument above, there can be no reasonable dispute, the tribes believe, that *some* kind of allocation is necessary in order to prevent State-authorized preemption of the treaty fishing right. The next question that is presented for determination then, is what the actual allocation should be. In making this determination, the District Court was faced with the task of reconciling the clear reservation in the treaties of a *right* of *taking* fish, secured to the tribes, with the concept implicit in "in common with" that the tribes would share the resource with the citizens of the territory. In addition, in making this determination, the court was required to consider the evidence presented concerning the negotiations of the

treaties and the understanding of the parties, and consider the relevant legal precedents governing the meaning of the treaty.[385]

Obviously, this was no easy task. However, the conclusion of this process seems to the tribes to be clear: when all of these factors are considered, there are only two alternatives which can be sustained consistent with the evidence and with the legal rules enunciated by this Court. Either the District Court was correct and the import of the Stevens treaties is that the tribes and the non-treaty citizens share equally the fish passing through the usual and accustomed fishing places of the tribes, *or* the treaties secure to the tribes sufficient fish to meet their fair needs. The second alternative, a more generous one to the tribes, was the one suggested to the District Court by the tribes at trial. It is based on the precedents of this Court dealing with reserved water rights. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963).

There is neither evidence nor legal precedent for the State's interpretation of the treaties and the District Court specifically rejected it. This section of the argument will demonstrate that the District Court's decision represents a reasonable reconciliation of the various factors outlined above; the equal sharing principle represents the absolute *minimum* that could be held reserved by the tribes consistent with the evidence and the previous decisions of this Court.

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385. As noted in Part III-B, *supra*, the process of construing Indian treaties consistent with federal law consists of both law and fact. In addition, the canons of construction long held applicable to the interpretation of Indian treaties, require the federal courts to give a particular focus to their inquiry.

As noted above, the pivotal canons of construction concerning Indian treaties require that treaties be interpreted so as to carry out their ultimate objectives and as they were understood by the Indians. *See Winters v. United States*, 207 U.S. 564 (1908); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). This Court has applied the canons to effectuate the general purpose of the treaties—to provide permanent homes for the Indian tribes where they could become economically self-sustaining. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737, 752, 754 (1866); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Winters v. United States, supra; Alaska Pacific Fisheries v. United States, supra*. A closely related purpose for the establishment of reservations generally has been to enable the Indians "to maintain . . . their way of life . . . ." *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968). These generalized purposes are, of course, reflected in the Stevens treaties. *See e.g.*, Treaty of Medicine Creek, Arts. II, V, VIII, and X, 10 Stat. 1132 (1854).

In the case of the Stevens treaties, however, the evidence demonstrates a specific intention that the tribes should continue to sustain themselves through fishing. As noted above, the expert testimony before the Court indicated that the tribal negotiators probably understood that they were surrendering the exclusivity of their fishing right in agreeing to share the resource with the non-Indians, but that they would continue to take all the fish they needed for personal, ceremonial and economic use. The fact that the parties to the treaties intended that the tribes should continue to support themselves through fishing is strongly

supported by the fact that the reservations created for the Washington tribes were much smaller than those created for the Plains and other Western Indians. As the Ninth Circuit Court of Appeals observed in *Skokomish Indian Tribe v. France*, 320 F.2d 205, 210 (9th Cir. 1963):

> It is clear that the reservation was intended only as a residence, and the Indians were to remain free to roam and fish at their usual places.

It is also clear, as indicated above, that the United States negotiators understood the importance of fishing to the Indian culture and economy and specifically agreed to guarantee its perpetuation—"this paper secures your fish."

Finally, there is some circumstantial evidence that the tribal negotiators may have understood that there would be an equal sharing of the resource with the citizens of the territory, a concept capable of being conveyed in Chinook jargon.

There is nothing in the facts, however, in support of the State's conclusion that the tribes were agreeing to fish on exactly the same basis as the non-Indian citizens and that they would be subject to the identical controls of the territorial government. In fact, there is some indication that the tribes believed that they would have the right to control the non-Indians' permissive use of tribal usual and accustomed places. Consistent with this evidence concerning the basic purpose of the treaties, the District Court held:

> The rights secured by the treaties to the Plaintiff Tribes is a reserved right, which is linked to the marine and fresh water areas where the Indians fished during treaty times, *and which exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes.*

(emphasis added) CL 20, 384 F.Supp. at 401, Joint App. at 195.

The District Court's conclusion that the purpose of the treaties was to provide a volume of fish sufficient to the fair needs of the tribes is also supported by a number of this Court's decisions. In *Winters v. United States*, 207 U.S. 564 (1908), the question presented was whether the Indians of the Fort Belknap Reservation had a superior right to use the waters of the Milk River for domestic and irrigation purposes. The reservation had been created by the Treaty of 1888, under which the tribe ceded to the United States a large tract of land formerly used and occupied by them, but retained a smaller portion of that tract which became the Fort Belknap Reservation. Under ordinary principles of water law, the non-Indian settlers in the area would have had a superior right to use the water of the Milk River because of their prior appropriation. The treaty made no mention of the reservation of any water right.

Nevertheless, the Supreme Court held that the tribe, by implication, necessarily reserved to itself a superior right to use the water. The Court stated:

> It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless.

207 U.S. at 576. Although it was argued to the Court that the Indians must have been aware of this and still made no reservation of the waters, the Court answered:

> The Indians had command of the lands and waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Id. The Court concluded:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. *And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.* On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them.

Id. at 576-577 (emphasis added).[386] In this situation, where there may also be competing inferences which can be drawn concerning the meaning of the treaty, the one which will support the basic purpose of the treaty, to allow the Indians to sustain themselves economically based on fishing, should be adopted.

The *Winters* case, in which no actual apportionment of the water was ordered by the Court, was followed and extended by this Court in *Arizona v. California*, 373 U.S. 546 (1963). The core of the Court's holding in *Arizona v. California* regarding Indian water rights was:

> The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the

386. The Court's reference to the "double sense" in which words might be used is particularly applicable in the instant case where the State and the non-treaty fishermen argue that the "in common with" language of the treaties should be interpreted in the same technical legal sense they argue it held at common law according to Kent's Commentaries on American Law. *See* Part III–C-1, *supra*.

> waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such, are entitled to priority under the Act.
>
> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all of the practicably irrigable acreage on the Reservations.

373 U.S. at 600. The Court specifically rejected Arizona's contention that the water should be allocated between the State and the tribes based on the sort of "equitable apportionment" that has been utilized by this Court in adjudicating the rights of various states to the waters of an interstate stream. 373 U.S. at 597. It is significant that in both *Winters* and *Arizona v. California*, the Indian water rights were given priority even though there is no evidence that the Indians had actually bargained for special water rights and even though no particular mention of them was made in the treaties.[387]

Finally, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), this Court made clear that the reserved rights doctrine applied not only to water but also to fisheries. In that case, the question was presented as to whether a statute setting aside "the body of lands known as the Annette Islands" as an Indian reservation in Alaska

387. The vitality of the *Winters* doctrine was recently reaffirmed by this Court in *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976).

also included within the reservation the navigable waters surrounding the Islands. The issue was presented because of the presence of an extensive non-Indian fish trap. The trap owner argued that the statute referred only to the "body of lands" and consequently the reservation did not include any of the surrounding water.

The Court noted that the Annette Islands bore a fair supply of timber but that only a small portion of the upland was arable; on the other hand, salmon and other fish were plentiful in the waters surrounding the reservation. The Court stated:

> The purpose of the Metlakahtlans, in going to the Islands, was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

248 U.S. at 88. In spite of the fact that the statute made no specific reservation of the waters surrounding the islands nor of the fishing activity of the Indians, the Court concluded that the use of the adjacent fishing grounds was essential to the purposes of the reservation and that, consistent with the rule of construction that statutes passed for the dependent tribes should be liberally construed, the reservation necessarily included the surrounding waters as well as the upland. *See also Menominee Tribe v. United States*, 391 U.S. 404, 406, n. 2 (1968).

The considerations favoring effectuating and giving priority to the Indian treaty rights reserved by the treaties in

the instant case, are, of course, much stronger since the reservation of the treaty right was *express*. The Northwest tribes specifically demanded and received assurances that their ancient fishing rights would be protected and the treaties expressly secure them the "right of taking fish at usual and accustomed grounds and stations." The evidence clearly demonstrates that the reservation of the fishing right to the tribes was not an incidental part of the consideration promised them, but was the one central protection that the tribes insisted upon to protect a culture and economy centered around the anadromous fish.

The implied reservations of water rights construed in *Arizona v. California* guaranteed the Indians sufficient water to irrigate all of the reservation's practicably irrigable acreage. Surely the construction of the *express* guarantee of the Stevens Treaties cannot be less generous. Especially in the context of the historical evidence concerning Indian commercial fishing, *Winters* and *Arizona v. California* strongly support the conclusion that the tribes are entitled to an opportunity to catch sufficient fish to enable them to earn a livelihood as well as satisfy their subsistence and ceremonial requirements.

As discussed in Part II, *supra*, the inescapable fact facing the District Court was that an allocation was necessary because State regulations had effectively authorized non-treaty fishermen to preempt the resource and had discriminated against the Indian treaty opportunity. In attempting to make any quantification of the Indian treaty opportunity, however, based solely on Indian "need," the District Court faced a number of difficulties. First, because of the historic pattern of state discrimination and preemption, the Indian fishing effort prior to 1974 was not a reliable guide. As the District Court specifically found, the pattern of State regulation had forced many Indian fishermen out of the industry. FF 33, 384 F.Supp. at 358, Joint App. at 115; *see also* Ex. USA-20, Joint App. 395. On the other hand, measuring Indian needs in terms of economic realities, the evidence clearly indicated that in order to maintain an adequate standard of living the tribes would have to take an exceedingly large share of the fish. For example, based on 1973 figures, evidence was presented to the Court that if the tribes took 80% of the harvestable number of the fish from the fisheries in ten major river systems in Puget Sound, it would provide enough income to provide only 401 Indian families with an annual income of $11,000.00,[388] scarcely comparable to that necessary to enjoy a standard of living comparable to that enjoyed by their non-Indian neighbors.[389] Moreover, the compilation of Indian needs was complicated by the well-established fact that fishing, at treaty times, was the universal male occupation of the Washington Puget Sound and ocean tribes. *See* Joint App. at 365.

In addition, the Court was also faced with the difficult problem or reconciling a reserved right sufficient to meet the Indian needs, vis-a-vis *Winters* and *Arizona v. California*, with the treaty language clearly providing that the resource would be shared with non-Indian fishermen. This, as noted above, did not present any problem at the time of the negotiation of the treaties since full protection of Indian tribal needs was not threatened by the minimal

388. Ex. MS-1, Table 13 at 30-32.

389. *Cf.*, 25 U.S.C. §1451, where Congress established a federal policy designed to enable Indians to "enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."

non-treaty harvest. In 1974, however, the fishery resource was not so abundant. Recognition of the full contemporaneous needs of the tribal fishermen, in light of this shortage, would have led to the prohibition of any non-treaty fishing on stocks bound for many Washington rivers, and a predominant share on others.

In order to reconcile these conflicting considerations, the District Court concluded that the exercise of the tribes' fishing right was limited:

> The right [secured to the tribes by the treaty] is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes.

CL 20, 384 F. Supp. at 401, Joint App. at 195.

And:

> The exercise of a treaty tribe's right to take anadromous fish is limited only by the geographical extent of the usual and accustomed fishing places, the limits of the harvestable stock, the tribe's fair needs for fish, *and the opportunity for non-Indians to fish in common with Indians outside reservation boundaries.*

CL 25, 384 F. Supp. at 402, Joint App. at 196. (emphasis added)

And:

> The phrase "in common with" operates only to limit the exercise of the tribes' right to a share of the resource which will be consistent with preservation and maintenance of the resource and with the reasonable harvest by others of such fish as are not reasonably needed by the tribe. . . .

CL 28, 384 F. Supp. at 402, Joint App. at 197; *see also* Declaratory Judgment ¶17, 384 F. Supp. at 407, Joint App. at 206.

The District Court's allocation order gives recognition to a portion of the "fair needs" of the tribes and allows

them to harvest fish in their traditional ways at their traditional places, while reserving to the non-treaty fishermen not only an equally fair share of those runs, but essentially full freedom to harvest the plentiful salmon runs bound for places other than Puget Sound. The court's allocation resulted in a total tribal catch constituting only 18% of the total Washington catch in 1977; the District Court's allocation principle of equal sharing of the runs passing through the usual and accustomed places of the tribes, is the *minimal* logical accommodation of Indian needs with the tribal agreement to share the resource with the citizens of the Territory.

The District Court's allocation is also strongly supported by the doctrine of tribal sovereignty. Fundamentally, the District Court's allocation gives specific recognition to the fact that the treaties were negotiated between two parties, the United States and the tribes. As noted in Part III-D-2, *supra*, the concept of Indian tribes as sovereign entities capable of entering into treaties with the United States was well established by 1854. Kent specifically discusses the quasi-sovereign status of Indian tribes and the policy of the United States to extinguish Indian title with fair compensation through the mechanism of entering into treaties with the tribes themselves. 3 Kent, *supra*, at 381 *et seq.* Indeed, as this Court recently recognized in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973) the concept of tribal sovereignty has survived and remains today a cornerstone of federal Indian law. While the doctrine has undergone considerable evolution, and the power of the United States to enter into treaties with the tribes eliminated, the Court nevertheless held that tribal sovereignty provided the "backdrop" against which the applica-

ble treaties and statutes must be read. 411 U.S. at 172-173. Indeed, the concept of tribal sovereignty has served, directly or indirectly, to resolve many modern cases. *See e.g., Williams v. Lee,* 358 U.S. 217 (1959); *United States v. Wheeler,* 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

As the Ninth Circuit Court of Appeals recognized in the initial appeal, "the treaties must be viewed as agreements between independent and sovereign nations. *McClanahan,* 411 U.S. at 172, 93 S.Ct. 1257." It is the co-sovereign status of the tribes and the United States which provides the fundamental principle to be applied in the judicial apportionment—that of equal sharing.

The State of Washington contends that the "equality of opportunity" implicit in the "in common with" language of the treaty was meant to establish parity between individual fishermen, not between the tribes on the one hand and the State, as successor to the rights of the United States, on the other. State Br. at 39.[390]

390. The State put it as follows in its brief:

> The critical question is: How is equality of opportunity to be measured? Is it to be equality of opportunity among all *individual* fishermen, Indian and non-Indian alike? Or is it to be equality between two *groups* of fishermen, one treaty Indians and the other all citizens, both Indian and non-Indian?
>
> This initial question of how equality is to be measured is pivotal.

State's Br. at 39. While the State's reference to "*groups* of fishermen" obscures the fact that the treaties were negotiated between two sovereigns, the United States and the tribes, not "groups," the State's formalization of the issues is correct at least in this respect: it amounts to a concession that if *any* allocation is to be made to the tribes at all, application of the concept of equality of opportunity leads naturally to the conclusion that tribes should be given an opportunity to harvest 50% of the fish bound for usual and accustomed grounds and that the fishermen licensed by the State should be granted an opportunity to harvest the other 50%. Equality of opportunity means either an equal sharing between the sovereigns, the District's Court's position, or it means individual equality with no allocation whatsoever. If the State's position that the treaty permits no allocation at all is rejected, as it must be, the State's argument would support the conclusion that no reasonable position is available less than that decreed by the District Court.

Not only does the language of the treaty, as discussed above, undermine this conclusion,[391] but the State's contention totally ignores the nature of Indian society, the established case law on Indian treaties and Indian hunting and fishing rights, and generally accepted principles governing the relationships between governing bodies and their citizens in the former's treaty relations.

The Court of Appeals correctly recognized that the Indians' fishing rights continued to be *tribal* rights, not belonging to any individual Indian. 530 F.2d at 688. In so doing, the Court specifically recognized the long-standing approach of the United States government to Indian property rights. *Cf.* 3 Kent's Commentaries, *supra,* at 383. In fact, 25 U.S.C. §177, enacted June 30, 1834, 4 Stat. 730, provides in part:

> No purchase, grant, lease or other conveyance of land, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

By implication, the statute recognizes that title to Indian lands rested in the tribes. As the court held in *Montana Power Co. v. Rochester,* 127 F.2d 189, 192-93 (9th Cir. 1942):

> The Indian society is communal in character rather than individualistic; and this is particularly true in respect of the hunting and fishing grounds of the Indians.

See also Journeycake v. Cherokee Nation, 28 Ct.Cl. 281, 302 (1893), *aff'd.,* 155 U.S. 196 (1894). Similarly, in

391. The reference in the article of the treaty reserving the off-reservation fishing right to "*said* Indians" refers back to the earlier language in the previous articles describing the parties to the treaties as the "tribes." In context, therefore, said Indians means the tribes, not individual Indians as the State contends.

Whitefoot v. United States, 293 F.2d 658, 156 Ct.Cl. 718 (1961), *cert. denied*, 369 U.S. 818 (1962), the court stated:

> While property is vested in a tribe, it is the individual member who enjoys the use of the property. [citing Federal Indian Law] As to fishing, this is true. But like the lands, the interests in the fisheries are communal, subject to tribal regulation.

Id. at 663 (footnote omitted). *See also Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974) where the Court of Appeals noted that tribal fishing rights were communal rights even though individual members benefitted from those rights.[392] *See also* F. Cohen, *Federal Indian Law*, 750 (1966).

In its original decision, the Ninth Circuit Court of Appeals succinctly described how the tribal nature of the fishing right, coupled with the communal nature of tribal property, completely undermined the State's assertion that the treaties intended to reserve only a right of individual competition:

> Each tribe bargained as an entity for rights which were to be enjoyed communally. *See Sac and Fox Indians (Iowa) v. Sac and Fox Indians (Oklahoma)*, 220 U.S. 481, 483-84 (1911). Reservations were reserved to each tribe qua tribe. Not until 1887 was the President authorized to allot reservation lands to individual Indians. 24 Stat. 388. Individual Indians had no individual title to property, but participated in the communal rights of the tribe. 'The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder

392. The language from *United States v. Winans*, 198 U.S. 371 (1905) quoted in the State's Brief at n. 24 is not inconsistent with these cases. Each individual Indian *does* have an enforceable right, as a member of the signatory tribes, to utilize the tribal fishing rights. Nevertheless, the treaty negotiations were conducted with the tribes and the treaties themselves were signed by the tribes not by individual Indians. The individual fishing right is merely derivative of his membership in the tribe.

> in the property of a corporation.' F. Cohen, *Handbook of Federal Indian Law*, 183 (1942, reprinted 1971). The right to fish at usual and accustomed area grounds was one such communal property right pertaining to the tribe. [citations omitted] *To hold that Indian negotiators intended it to secure for each member of the tribe the right to compete for fish on equal terms as an individual with each individual settler—the State's view of the "in common with" clause as a prototype of the Fourteenth Amendment's equal protection clause—thus would be to disregard the fabric of Indian society at the time the treaties were concluded, a society of communality whose nature was reflected in the subsequent legal character of property ownership which evolved in Federal Indian law.*

520 F.2d at 688. (emphasis added)

In addition, it is a well-established principle of international law that when a sovereign nation treats with another nation the rights created are held by the sovereign, even though individual citizens may derivatively enjoy the rights. This pertains to fishing rights as well as others. As stated in the *Restatement (Second), Foreign Relations Law of the United States*, §113, Comment (e) (1965):

> [M]any international agreements such as treaties of friendship, commerce, and navigation, contain provisions establishing certain benefits for the nationals of the states that are parties to the treaties. The traditional view is that any rights arising out of such provisions are, under international law, those of the states and that individual rights are only derivative through the states.[393]

393. In the United States, where a treaty is the supreme law of the land, individuals can directly enforce their rights under the treaty, as in *Winans*. RESTATEMENT (SECOND) LAW, Foreign Relations Law, §101, Comment (e) (Tent. Draft No. 3, 1959). The example which the RESTATEMENT gives is when two nations grant certain fishing rights to the other's nationals. *Id. See* Part III–D-3, *supra*, describing the Treaty of 1818 between Great Britain and the United States which describes certain North Atlantic fisheries rights which the inhabitants

[Footnote continued on Page 166.]

As the Ninth Circuit realized, recognition of the co-sovereign status of the United States and the tribes leads naturally to the conclusion that they intended by "in common with" to provide that their respective constituents would share the resource equally. 520 F.2d at 687-88:

> We affirm the conclusion of the District Court that the fundamental principle to be applied in a judicial apportionment is that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. This conclusion flows naturally from the circumstances in which the treaties were signed.
>
> Treaties must be viewed as agreements between independent and sovereign nations.

And, later on the same page:

> In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. An attempt to partition equitable rights which these parties were to hold in common must reflect this initial equality. The District Court was not required to decree a perfect 50-50 division of fishing opportunity. . . . Nevertheless, a 50-50 apportionment reflects the equality existing between the two bargaining parties and best effectuates what the Indian parties would have expected if a partition of fishing opportunity had been necessary at the time of the treaties.

In addition, the District Court's allocation, as the Court of Appeals recognized, is supported by analogy to the law of co-tenancy. 520 F.2d at 687. This is particularly true in light of the fact that the similar language in the treaty of

of the United States shall have "in common with the subjects of his Brittanic majesty . . . ." The United States has consistently interpreted the Treaty as creating national, not individual rights. *See, e.g.*, the argument of Senator Elihu Root, the United States representative during the Hague proceedings. E. Root, *North Atlantic Fisheries Arbitration*, 126 (1917).

1818 was described by a number of American Secretaries of State and legal authorities as creating a "tenancy in common." *See* Part III-D-3, *supra*. While it is true as Judge Kennedy pointed out in his concurring opinion in *Puget Sound Gillnetters Association v. United States District Court*, 573 F.2d 1123, 1134-1135, that co-tenants do not necessarily hold equal shares of the property, nevertheless, it is well established that where title to property is held by two or more tenants in common, and the fractional share of each co-tenant is not specified in the transferring document, equal shares are presumed, in the absence of contrary evidence. *See* 2 American Law of Property, §6.5; Tiffany, *Real Property*, §426.[394]

Finally, the District Court's interpretation has ample support in its finding that the words "in common with," in common parlance at the time the treaties were negotiated meant "belong equally to more than one." FF 24, 384 F. Supp. at 356, Joint App. 111. Under questioning by the Court, Dr. Lane testified that a contemporary dictionary definition would be a useful source in divining the intent of the non-Indian drafters. As the District Court concluded: "By dictionary definition and as intended and used in the Indian treaties and in this decision, 'in common with' means *sharing equally* the opportunity to take fish at 'usual and accustomed grounds and stations'. . . ." 384 F. Supp. at 343, Joint App. 88-89.

394. The tribes do not contend that the law of co-tenancy is, in all respects, a perfect analogy. Nevertheless, like the other factors outlined above, it strongly supports the conclusion that the treaty opportunity to fish passing through the tribal usual and accustomed grounds should be subject to an equal sharing principle. Although the State and the Associations take great comfort in Judge Kennedy's concurring opinion, the tribes believe that both the Petitioners and Judge Kennedy took the Ninth Circuit co-tenancy analysis much too literally.

In sum, the District Court's decision to limit the tribes' reserved fishing right to a 50% share in light of their agreement to share the fish resource with the citizens of the other negotiating sovereign, is clearly reasonable.. The next two sections of the brief address problems with implementation of the District Court's decision which have arisen since it became final.

IV. The District Court's Orders Are Consistent With Conservation of the Resource and Are Appropriate Under the Circumstances.

In this section the Tribes respond to Petitioners' charges that the District Court's orders frustrated efforts to preserve the fish resource, displaced the State as manager, improperly allocated the 1977 harvest and cannot bind the State-licensed fishermen.

A. *State Conservation Power Is Unimpaired.*

Washington misrepresents the effect of federal court orders on State conservation authority, saying:

> Before the state can enforce regulations of general applicability on treaty Indians fishing in usual and accustomed grounds, *it must first establish to the satisfaction of the District Court that the regulation is "reasonable and necessary for conservation."*

State Br. at 103 (emphasis added). This is an *exception* not the rule. The Associations repeat this inaccuracy,[395]

395. The Gillnetters state "any Department of Fisheries regulation" was prohibited "unless the Department first satisfied the court of the conservation need. . . ." Associations' Br. at 16.

In addition, the American Institute of Fishery Biologists make the same error. Brief of *Amicus Curiae* American Institute of Fisheries Research Biologists at 24, 27. The Institute also claims that State regulations must be submitted to the Fisheries Advisory Board 48 hours prior to effectiveness, Br. 28, apparently referring to the Order Re: Rules of Procedure of Fishery Advisory Board and Resolution of Disputes, Docket No. 2703. Again, the Institute is simply incorrect. The order explicitly conditions the procedure on parties contributing "to a central 24-hour telephone service to receive notice by the State." Since the parties have not agreed on a foolproof way to operate such a system, the procedure referred to by the Institute has never gone into effect.

thereby glossing over the hundreds of in-season openings, closings, and restrictions of fishing which constitute the bulk of the State's conservation regulation, and for which the District Court has made explicit provision. Thus the State and the Associations utterly distort the harmonious relationship between the federal court's decrees and State conservation authority. In fact, Washington has *never* found it necessary to make such a showing to the District Court because of the actual means by which the fishery is regulated.

Washington's agencies regulate fisheries by both permanent and emergency regulations. The two types of regulations serve distinctly different purposes and are treated separately by the lower court. Emergency regulations are promulgated in advance of, and throughout, the fishing season to control fishing times, places, species, gear and so forth. Control of these variables insures adequate escapement to perpetuate the fish runs. These regulations are the true conservation regulations, and no court review or approval is required before they may be applied to treaty fishing. The court ruled:

> In order to accommodate . . . conservation necessity . . . emergency regulations are enforceable by the state upon fiilng with the court and service upon the tribes.

384 F. Supp. at 417, ¶19, Joint App. 225. The Order for Program to Implement Interim Plan simply provides:

> Emergency regulations are *enforceable upon filing* them with the court and service upon the other parties. . . . Any party may respond and seek immediate review. Requests for emergency consideration by the court will be given priority and determined rapidly.

Joint App. at 439. (emphasis added) These rulings are explicitly designed to permit the State of Washington to apply *all* of its in-season regulations to treaty fishermen.

Emergency regulations are used because data from incoming fish runs change rapidly, and the State has no opportunity to comply with the notice and comment requirements for permanent regulations under the Washington Administrative Procedure Act. The State Act, therefore, allows agencies to promulgate emergency regulations[396] and regulation of the Washington salmon harvest has been accomplished through emergency regulations in recent years. In 1978, for example, the State adopted 139 such emergency orders. These regulations are, by the District Court's orders, immediately enforceable against treaty Indian fishermen and supercede any conflicting tribal regulations.[397] Any tribe seeking to challenge the conservation justification for the regulation must invoke the court's jurisdiction and come forward with the evidence showing the absence of a conservation purpose. 384 F.Supp. at 417, ¶19, Joint App. 225.

Permanent regulations by contrast, are not used for making the day-to-day adjustments needed to preserve

396. Emergency regulations are accompanied by a finding that the regulation is necessary for the preservation of the public health, safety or general welfare, and a short statement of the facts constituting the emergency. RCW 34.04.030. These regulations become enforceable under State law upon filing with the Washington Code Reviser's Office.

397. There is a narrow exception for two tribes, the self-regulating Yakima and Quinault Nations. These tribes historically, and at present, meet all of the qualifications and conditions specified at 384 F. Supp. 340-41, Joint App. 84-85. An essential condition of their exceptional status is that their regulations must include "any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation." *Id.* If any self-regulating tribe fails to include regulations which *are* necessary for conservation, or fails to enforce them, it thereby ceases to meet the conditions for self-regulatory status and becomes fully subject to the effects of state emergency regulations. In such case there would be no need to rely on the tribe for compliance, State's Br. 104, for the State could take unilateral action to protect the fish. Notably, neither tribe has ever violated this condition, so the State's concern about having inadequate latitude to implement a conservation program, is obviously misplaced.

the fish runs. These regulations implement the broad scope of state police power to implement policy and meet the needs of the body politic,[398] as defined by the legislature. These regulations, together with legislative enactments form the regulatory structure which the District Court found, "operate(s) to discriminate against the tribes' treaty right to fish." CL 38, 384 F.Supp. at 403, Joint App. 199. In fact, the District Court specifically enjoined several of the general regulations, 384 F.Supp. 415, ¶6, Joint App. 221.

The lower courts have properly required a showing that general regulations, which are not immediately related to any specific time or place where fish runs might be damaged, must be necessary for conservation. That is the rule consistently enunciated by this Court's cases. In *Puyallup I* this Court noted:

> As to a 'regulation' concering the time and manner of fishing . . . we said that the power for the State was to be measured by whether it was 'necessary for the conservation of fish.' . . .
>
> *The measure of the legal propriety* of those kinds of conservation measures *is* therefore *distinct from the federal constitutional standard concerning the scope of the police power of a State.* (citing cases)

391 U.S. 392, 401 n. 14 (1968). (emphasis added) If no showing of conservation necessity was required for the State's permanent regulations to be applicable, *United States v. Winans*, 198 U.S. 371 (1905), *Tulee v. Washington*, 315 U.S. 681 (1942) and *Puyallup II*, 414 U.S. 44

398. The permanent regulations, among other things, classify types of fish, close waters to all commercial fishing at all times, forbid certain types of fishing gear, require specified fish receiving tickets and use of weight delivery sheets. They contain a whole host of general regulatory enactments, unrelated to specific conservation needs, *see* Chapter 220, Washington Administrative Code.

(1973) would be undermined since the permanent regulations require licenses and forbid the use of "fixed" gear.

The distinction between the lower court's orders affecting permanent and emergency regulations is essential. It illustrates the District Court's refusal to interfere with regulations which, in the State's judgment, are necessary for *protection* of a fish run. The court's rulings reflect a complete awareness of the need for in-season regulations which fishermen understand to be binding upon them. It precisely complies with this Court's rule that treaty fishing rights may be curtailed *when necessary for conservation.*[399]

> Rights can be controlled by the need to conserve a species; and the time may come when the life of the steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon.

Puyallup II, 414 U.S. 44, 49 (1973).

The State now claims a need to "be able to bind all citizens, both treaty Indians and other citizens to its regula-

399. The Tribes still feel, however, that it is unfortunate that the legal basis for State regulation of off-reservation fishing has never been adequately explained. Nowhere in any of the treaties was there any provision for the future State of Washington or any other non-Indian government entity to place restrictions on native fishing. As we stated in our conditional cross petition in the original appeal in this matter (Causes No. 75-588 and No. 75-592):

> The record establishes beyond question that the Indian parties did not intend to submit their fishing rights to the control of any then non-existent non-Indian authority. Nothing in the record or the treaties can support a contrary interpretation, especially in view of the rules of Indian treaty construction.

Brief of Respondent Indian Tribes in Causes No. 75-588 and No. 75-592 at 28.

This argument is not being detailed here. Although the tribes are still firmly committed to its validity, the question appears to be now settled by this Court as a matter of domestic law governing Indian treaty fishing rights. Thus, the tribes have put forward their arguments under those doctrines.

tions to prevent overfishing of salmon stocks." State's Br. at 112. This is precisely what the District Court's orders permit the State to accomplish. Neither treaty nor non-treaty fishing is permitted to cut into escapement requirements; no judicial hearing or showing of necessity precedes the application of these regulations to treaty fisheries,[400] and the State is simply wrong in implying to the contrary.[401]

The State similarly misrepresents the facts in asserting that the District Court's rulings do not "equitably pro-rate the sacrifices necessitated by conservation goals between the two groups—treaty Indians and all other fishermen," State Br. at 104. In fact, all fish needed to meet conservation requirements are subtracted before allocations of harvest opportunities are made for either group. 384 F.Supp. at 343, Joint App. 88. Washington raised this same argument in 1974 prompting the District Court to explain that its rulings were being "taken out of context" and did not exempt the treaty fisheries from an equal share of conser-

400. Washington alleges (State Br. 109) that it has repeatedly been required to intervene to close treaty fisheries for conservation needs. It is important to note that enactment of an emergency conservation closure occurs as a matter of course whenever the State, through its catch monitoring activities, determines that the total number of harvestable fish have been taken. It does not ordinarily mean that anyone is fishing improperly. The closures are enacted so that enforcement officers can prevent further fishing. Most closures cover more than one area and more than one tribe. *See* W.D.F. Technical Report 40, 1977 Summary, at 4, Docket No. 5440. The tribes also enact closures in those situations, sometimes earlier than the state closures. *Compare, e.g.*, tribal regulations filed 10/20/78, Docket Nos. 5189, 5190, with State regulation filed 10/23/78, Docket No. 5203.

401. As the Chief of Harvest Management for the Department of Fisheries states as to the effect of the District Court's rulings: "Although treaty Indians have legally specified authority over tribal fisheries, the ultimate responsibility for conservation of the salmon resource is embodied in the Department." Joint App. 554.

vation sacrifices.[402] The Court of Appeals also explicitly ruled that treaty Indians must share in the sacrifices necessary to meet escapement needs. 520 F.2d at 686 n. 3, Joint App. 48. In context, the court's rulings are simply a restatement of its finding that the State typically regulates its fisheries to allow all of the harvest of the runs to be taken before they reach many of the usual and accustomed places of the plaintiff tribes. Regulations which thus zone treaty fishermen out of the harvest and reserve the harvest for non-treaty fisheries cannot be considered *necessary* for conservation. They are merely the net result of the political pressure of non-treaty fishing interests. *See Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169, 173 (9th Cir. 1963); *Sohappy v. Smith*, 302 F.Supp. 899, 907-08 (D.Or. 1969).

The Petitioners' description of conservation regulations and of sharing the sacrifices needed to meet escapement goals are an outright attempt is mislead this Court. But it is hypocritical in the face of overwhelming evidence that the State has refused to make any effort to control illegal non-treaty fishing, to suggest the court's orders have "precipitated the rash of uncontrollable illegal fishing" State Br. at 104.

Long before the State Supreme Court rulings halted state enforcement, Washington had adopted a tolerance policy of not issuing citations.[403] In the past two years the State has utterly refused to enforce its regulations against non-treaty fishermen encroaching on the tribal share.[404]

402. Rulings on Fisheries Questions per Reconsideration Motion, No. 16, 384 F. Supp. at 411, Joint App. 213.

403. Sgt. L. Nelson testimony, Joint App. 523 (Mar. 28, 1978); B. Gruett testimony, Joint App. 603, ¶9 (Oct. 11, 1976).

404. W. Miller testimony, Joint App. 519 (Sept. 27, 1977).

The State's management staff have pointed out that fisnermen tend to evaluate the cost of being cited relative to the profits of continued illegal fishing.[405] Obviously the deterrence to illegal fishing will be minimal when both the Director of Fisheries and the Attorney General's staff announce on the record that there is little likelihood of State convictions.[406]

Finally, the District Court's concern with protecting the fish runs is exemplified by its encouragement of tribal enforcement of tribal regulations. There are no "conflicting voices of authority," State Br. at 109, directing the tribal fishermen, for the State has clear power to enforce its conservation regulations if any regulatory conflict arises.[407] In fact, the tribal regulations are even more restrictive than State closures, for they implement both conservation policies and the internal and social policies of the Indian governments. Some regulations restrict tribal harvests to protect ceremonial fisheries or to ban economically wasteful gear types. Tribal regulations also effect a division of harvest *among* the Indian tribes. The State has no conservation interest in which treaty fisheries take harvestable fish, *see* 384 F.Supp. at 417, ¶15, Joint App. 224.

In actual practice tribal regulation greatly assists enforcement of conservation regulations because of the presence of tribal officers, their familiarity with the unique

405. A. Austin, Docket No. 3945, Joint App. 606-07. *See* G. Marshall testimony, Tr. Nov. 3, 1978 at 21.

406. G. Sandison testimony, Joint App. 514 (Aug. 8, 1977); J. Johnson argument, Joint App. 514-15 (August 26, 1977).

407. The Washington Department of Fisheries recently reported, "Tribal regulations can also be more restrictive than Department regulations. This is usually due to inter-tribal allocation of no conservation interest to the Department. Where Department conservation regulations exist, conflicting tribal regulations are moot and have no authority. Where both regulations are the same, they are complementary." *1977 Summary of Regulations*, Technical Report 40, Docket No. 5440.

treaty fishery and the deterrent power of sanctions applied by a tribe to its members. Protection of this limited tribal regulatory power reduced the need for close State supervision and is most consistent with the intent of the treaties.[408] Moreover, in light of the postive effects of tribal enforcement efforts and the superceding character of State regulations which are necessary for conservation, the lower court's orders do not abridge this Court's ruling in *New York ex rel. Kennedy v. Becker,* 241 U.S. 556 (1916). There the Court dealt with separate *exclusive* regulatory powers which might effectively deny, to all, the power to preserve the fishery. Here the State's conservation power is carefully preserved. Only the tribes are denied the power to fully implement conservation policies for, since their jurisdiction is limited to treaty fishermen, they have been helpless to prevent the massive illegal fishing, by non-treaty citizens, which occurs literally before their eyes.[409]

The State calls for an end to the proliferation of management meaning that tribal regulation of their own members should be terminated. *See* State Br. at 109, 112. But the State's suggestion seeks to invade areas of concern exclusively and properly within the authority of tribes. As this Court said in *Puyallup III:*

> The [state] has no interest in how the catch is allocated among Indians . . . On the other hand, the Tribe has a separate interest in affording equitable treatment to its members. . . .

Puyallup III, 433 U.S. at 173. Similarly this Court said in *United States v. Wheeler,* 435 U.S. 313, 326, 331 (1978):

> The sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. . . .
>
> They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions . . .[410]

B. *The State Remains the Principal Fishery Management Authority.*

"Court preemption of the management of the fishery," argues the State of Washington, "is now complete." State's Br. at 4. And: "[t]he decisions . . . have substituted the district court as the manager of the fish resource in state territorial waters." State Br. at 100. These sweeping generalities overstate and obscure the actual lower courts' equitable remedies, which are carefully tailored to the nature and the scope of the violations of federal law found. The Associations ask this Court to believe that the District Court has designated, "himself as, in effect, the State Fisheries Commissioner." Association's Br. at 47. The facts are otherwise.

First, the field of fisheries management is broad and the court's ruling that harvest opportunities of certain stocks

408. The Indians clearly did not understand and were not told that their fishing might be restricted by a non-Indian government. Lane testimony, Joint App. 261-62. They *did* understand that their ownership right to the fishery, and customary modes of enforcement to protect it, were being preserved. *Id.* at 271, 377.

409. In 1977, for example, the number of chum which survived the fishery fell 72,000 fish short of the escapement goal in Hood Canal (Compare escapement goal, App. A-43 in Petition in No. 78-119 with escapement achieved, Joint App. 595). This was due to illegal non-treaty fishing which harvested some 110,000 chum salmon in violation of State regulations. Ex. PL-M-4(a), *see* Transcript April 6, 1978, at 285, 325.

410. *See Williams v. Lee,* 358 U.S. 217, 221 (1959) and the Court of Appeals' well-reasoned opinion in *Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974). The fact that tribes exercise their authority over tribal fisheries beyond reservation boundaries is not relevant. The treaties expressly reserved tribal rights off-reservation and therefore act as express federal law preempting otherwise applicable state law, 520 F.2d at 684, Joint App. 45, *cf., Mescalaro Apache Tribe v. Jones,* 411 U.S. 145, 149 (1973).

must be shared equally with treaty fisheries, has no effect whatever on most state activities.[411] The Assistant Director for Salmon within the Department of Fisheries, presides over five separate divisions which are responsible for salmon artificial production, natural production, harvest management, research and development and construction and engineering. Even within the comparatively narrow field of salmon harvest management, the District Court has carefully limited its action to the absolute minimum consistent with preserving the tribal treaty right.

Second, salmon harvest management involves data collection, pre-season run size estimation, in-season run size revisions, prediction of catches by Washington trollers and sports fishermen, setting maximum fishing harvest rates and establishment of escapement goals. All parties rely upon the State of Washington to perform these tasks. As the Chief of Harvest Management for the State Department of Fisheries stated in 1976: [T]he Department plays the leading role in establishing the technical basis for management of the runs and recommending harvest management considerations . . . ." Joint App. 354. In short,

411. Of course, Petitioners do not literally suggest that the District Judge has assumed the role of State Director of Fisheries, for the Director has responsibilities far broader than regulation of salmon harvest. The Department of Fisheries has a staff of 600 employees regulating 80 other species of fin fish, 44 types of shell fish, and the use of at least 26 types of fishing gear. Washington Administrative Code 220-12-010; 220-12-020; 220-16-101 to 145. State Fisheries management activities cover seals, sea lions, fishing in fresh water lakes, oyster diseases and pests, and other matters. The Department of Game manages 29 categories of game fish. Only one, the steelhead trout, is implicated in the litigation.

Even salmon management encompasses fish receiving tickets, aquaculture standards and facilities, and licensing review boards for state fishermen—matters unrelated to the District Court's orders requiring allocation of fishing opportunity. In short, as is obvious from the record in this case, the lower court's orders have neither preempted management of the fishery in state waters nor established the District Judge as the State Fish Commissioner.

Washington manages the salmon and steelhead fisheries. *See* 384 F.Supp. at 417, ¶17, Joint App. 224-25; Implementing Program, Joint App. 438-40.

Third, it *is* true that the Court has established *mechanisms* to settle technical disputes out of court and a procedure to judicially resolve those which cannot be settled. These were initiated in 1974 with the adoption of an Interim Plan, 384 F.Supp. at 420, Joint App. 229, which requires State and tribal biologists to formulate general principles for fisheries management and exchange of biological data. From the outset, the Court has used a fisheries expert as a technical advisor, to assist in this process.

To minimize judicial involvement in technical matters, the court initially required the parties to notify the technical advisor as disputes arose, prior to any judicial consideration. This procedure was refined through the creation of the Fisheries Advisory Board consisting of a representative of the State, of the affected tribes, and the nonvoting technical advisor. Joint App. 452.

The Fisheries Advisory Board has successfully resolved many of the underlying technical disputes in the salmon, steelhead, and herring fisheries. *See* Docket Nos. 5312, 5313. The high degree of technical cooperation achieved between the parties has resulted in a substantial improvement of management of the salmon fisheries.

The District Court has also unquestionably urged the parties to resolve their disputes informally and has required the parties and the Fisheries Advisory Board to submit plans for achieving a full settlement as was accomplished in the *United States v. Oregon* litigation.[412] After much

412. *See* Court of Appeals Record No. 77-3654, R. 824, 827, 829, 1013, 1021.

work in the Fisheries Advisory Board, the tribal delegate and the State delegate to the Board, approved a management plan on July 13, 1977.[413] The agreement was refined in additional discussions, then was adopted without material change by the District Court on August 31, 1977.[414] The Memorandum Order Adopting Salmon Management Plan, App. A-61, Petition in No. 78-119, contains nothing more than the parties' agreements to use mutually acceptable definitions and procedures in developing technical information. In practice, State management proceeds as usual except that Washington solicits comments from tribal fisheries biologists and, where appropriate, incorporates the tribal information into the pre-season harvest guidelines.[415] Typically, the tribes accept Washington's harvest management without any dispute, *see* Joint App. 610-13. Even if the tribes disagree with the State's plans, however, Washington can, and does proceed unilaterally unless the District Court's jurisdiction is invoked by a party and the Court finds that the treaty right is being restrained without a conservation justification.[416]

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413. Court of Appeals Record No. 77-3654, R. 1216.

414. In presenting the plan for Court approval, the Court's Technical Advisor reported:

> The attached report . . . states the points now agreed upon by the Fisheries Advisory Board. I believe that this statement, which represents a lot of hard work on the part of many people, is as far as the parties can go this year in reaching agreement on the technical aspects of the salmon management plan. Naturally there are many points which both sides would like to see further refined. I recommend that the Court adopt these agreed upon statements and order that they be implemented and encourage the parties to continue work to refine issues that may still be in dispute.

Joint App. 592.

415. *See* Docket No. 4476, 4477, 4480, 4586, 4615, 4702-A, 4722, 4750, 4809, 4843, 4912, *compare* Joint App. 560.

416. 384 F. Supp. at 419, ¶25(b), Joint App. 228.

C. *The District Court's 1977 Allocation Order Is Not An Abuse of Its Discretion.*

The allocation orders entered by the lower court completely belie the claim that the District Court has displaced the State as the manager, State Br. at 6. The Court, in essence, has said nothing more than that fishing opportunities on Puget Sound origin runs must be shared equally. Washington has refused to comply. It has not been preempted.

In 1974, 1975, and 1976 the District Court relied totally upon Washington to devise regulations which gave the tribes an opportunity to harvest fish at their usual and accustomed grounds and stations. In each case, Washington failed to maket the "substantial reductions" in non-treaty fishing required by the Court. In 1974 and the early fisheries of 1975, the State's compliance was in part blocked by adverse state court rulings. In the 1975 fall fisheries, however, and in 1976, the State's failure to make significant reductions[417] was simply further illustration of the

> recalcitrance of Washington State officials . . . which produced the denial of Indian rights requiring intervention by the district court.

520 F.2d at 693 (Burns, J. concurring), Joint App. 60.

Without more, this default by the responsible state officials provided ample justification for further remedial orders of the District Court. *Milliken v. Bradley*, 433 U.S. 267, 281 (1977), *citing Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). However, the interference by the State Supreme Court literally forced the District Court to act. The State Supreme Court in the cases now before this Court in No. 77-983 ruled that the

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417. *See* Preliminary Injunction 1975 Chum Fishery, Joint App. 450-51; Order Re: 1976 Coho ¶7-9, Joint App. 466, 468-69.

Department of Fisheries was without authority to allocate fishing opportunities between treaty and non-treaty fisheries, which, the court found, were similarly situated. The Department of Fisheries immediately reverted to the pattern of fishing regulations it had used prior to the District Court's decision in 1974. Testimony of P. Mundy, Joint App. 507 (Aug. 8, 1977). The Department publicly announced that it would not enforce reductions of non-treaty fishing, thus making official what had actually been an unofficial tolerance policy for some time. Since the District Court acted only when Washington refused, its entry of an allocation order is entirely reasonable.

The District Court, in 1974, and the Court of Appeals, in 1975, had clearly established the State's liability for regulating salmon fisheries for the sole benefit of its non-treaty citizens and in derrogation of the tribes' federally-guaranteed reserved right to take fish.[418] The lower court was, therefore, presiding over the remedial portion of the litigation.

This Court in *Milliken v. Bradley*, 433 U.S. at 280-81, set out the standards for the exercise of federal equitable principles in such circumstances and the District Court's orders measure up to these standards nicely: (1) The remedy related to the condition which offends the Constitution. It prohibited the State of Washington from regulating treaty fisheries in a manner not necessary for conservation and prevented the preemption of the salmon harvest by non-treaty fisheries. (2) The Allocation Order was indeed *remedial* in nature; it was designed as nearly as possible

418. See FF 217-18, 384 F. Supp. at 393, Joint App. 179-80, CL 32, 38-40, 384 F. Supp. at 403-04, Joint App. 198-99, 520 F.2d at 685, 687, Joint App. 46, 50.

to restore the treaty Indian tribes to the position they would have occupied in the absence of the State's unlawful conduct. The Order accomplished this by allocating the salmon runs which would normally return to usual and accustomed grounds and stations absent interception by state fisheries. The harvest allocations to the tribes were well within the fishing capabilities of the authorized treaty Indian fishermen. This enabled them to capture as near to an equal share of the harvest as the peculiar facts and equities of the season permitted. (3) The federal court remedy took into account interests of the State in managing its own affairs consistent with the Constitution. The State not only admitted but literally cried out that it was unable to manage the salmon harvest in a way which complied with the established federal rights of the parties. The State and non-treaty fishermen, as the Court of Appeals noted, gave the Court "no reasonable choice," 573 F.2d at 1126, App. A-3, Petition in No. 78-119.

Under these circumstances the District Court's actions were clearly within its equitable powers. As this Court recently stated:

> In fashioning a remedy, the district court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The district court had given the Department repeated opportunities to remedy [the violation]. If petitioners had fully complied with the court's earlier orders, the present [orders] might well have been unnecessary. But taking the long and unhappy history of litigation into acount, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

Hutto v. Finney, ___ U.S. ___, 98 S.Ct. 2565, 2572 (1978). Under the extraordinary facts of this case it is clear that

the District Court went no further than was necessary[419] to assure compliance with its 1974 decree.

Neither the allocation nor the enforcement orders raise any question of ordering State officials to act outside their authority.[420] Washington was enjoined from authorizing harvest of the treaty share, and the Court itself performed the task of making the allocations, which the Department of Fisheries could no longer lawfully do. The Court's action makes any claim as to the scope of State officials' authority moot.[421]

Finally, the lower court's orders do not abridge the 10th Amendment or principles of federalism. *Cf.*, Associations' Br. at 53-54. The treaty power, along with the 14th Amendment, prohibits certain State conduct, *see Missouri v. Holland*, 252 U.S. 416 (1920). A federal judgment enforcing such prohibitions does not abridge the 10th Amendment's

419. As the Court of Appeals stated, "The tribes have a right to the enforcement of the treaties." 573 F.2d at 1129, App. A-10, Petition in No. 78-119. Under the circumstances, the District Court had not merely the power, but a duty, to protect tribal rights by allocating fish. *Id.* at 1130, App. A-13, *cf., Berry v. Cooper*, 577 F.2d 322, 323 (5th Cir. 1978); *United States v. DeSoto Parish School Bd.*, 574 F.2d 804, 811 (5th Cir. 1978), *cert. pending* No. 78-458.

The Associations' argument that the 1977 and 1978 allocation orders have converted fishing "opportunity" to a "guarantee" of actual numbers of fish is nonsense. It must be recalled that allocations have been decreed only in situations where the tribes have "power" to harvest their full share. In these circumstances, absent prior interception, they *will* take their share as expressed in numbers of fish. The order creates no property interest in these fish prior to capture and gives the tribes only an *opportunity* to capture that number by preventing prior non-treaty preemption.

420. Even the Associations are unsure that the Court ordered the State to allocate. On one hand they say the District Court assumed "control over all allocations," Association's Br. at 17, on the other hand, they assert that the District Court ordered officials to "enforce regulations for the purpose of allocating the harvest of fish in Puget Sound," *Id.* at 50. Obviously, both things could not have and did not occur in 1977. The Court made the allocation and itself provided the necessary enforcement mechanisms.

421. If this Court nevertheless considers this issue it should realize that the cases cited in the Associations' Br. at 52, *viz. Bell v. School Board of Powhatan County*, 321 F.2d 494, 499 (4th Cir. 1963); *Thax-*

reservation of non-delegated powers to the State. *See Milliken v. Bradley*, 433 U.S. 267, 291 (1977), *Monell v. Department of Social Services of City of New York*, — U.S. —, 98 S.Ct. 2018, 2035 n. 54 (1978). Nor, under the extreme circumstances of this case, can the District Court's orders be said to have interfered with the functioning of a state agency on a broad prophylactic basis without regard to the need for a careful matching of its remedy to the condition which offends the Constitution. *Cf, Rizzo v. Goode*, 423 U.S. 362, 378 (1976). As the Court of Appeals noted:

> [W]e do not see now, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner.

573 F.2d at 1130, App. A-13, Petition in No. 78-119.

D. *The District Court's Injunctions Against State-Licensed Fishermen Are Proper.*

This section addresses the contention that the federal court cannot lawfully enforce an allocation between treaty and non-treaty fisheries because the individual non-treaty

ton v. Vaughan, 321 F.2d 474, 477 (4th Cir. 1963); *Wright v. County School Board*, 309 F.Supp. 671, 677 (E.D.Va. 1970), *rev'd other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); *Bradley v. School Board*, 51 F.R.D. 139, 142 (E.D.Va. 1970), stand, not for the proposition that a state can altogether escape its power and responsibility to operate its fisheries in conformity with federal law, but rather for the rule that where a state has directed *certain* officials to exercise a power *to the exclusion of others*, courts should ordinarily respect the state's own allocation of its powers and responsibility. Similarly, *Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U.S. 78 (1898); *United States ex rel. Johnston Co. v. County Court of Clark County*, 95 U.S. (5 Otto.) 769 (1878); *Board of Supervisors of Carroll County v. United States ex rel. Reynolds*, 85 U.S. (19 Wall.) 71 (1873) are erroneously cited by petitioners. The cases simply hold that *mandamus* is not the correct remedy to enforce state official compliance with an unclear federal right. At least one of the cases suggests that an injunction would be available to obtain such compliance.

fishermen are not named parties in the litigation. As a practical matter, it is not necessary for the Court to reach this question. As Washington points out, if the Court concludes that the treaties reserve to the tribes rights which are separate and distinct from those of non-treaty citizens, "such a conclusion would remove the impediment . . . to the exercise of necessary regulatory power by the Department of Fisheries." State Br. at 99. Thus, there will be no continuing need for injunctions like the ones at issue. The District Court's injunctions of September 27, 1977 and June 6. 1978, have become necessary only because of the unfortunate hiatus in State enforcement power.

The Court of Appeals upheld the September 27 injunction concluding,

> The fishers' interest is . . . derivative of the State's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party.

573 F.2d at 1132. If this Court reaches the argument, it must agree that the court was correct. The State has vigorously litigated this case, not as a reluctant representative, but in its sovereign capacity on behalf of citizens, and as the consistent representative of its licensees, the non-treaty fishermen. In addition, the District Court's orders can be sustained by the All Writs Act, 28 U.S.C. §1651, for they are necessary to protect and effectuate the court's judgments.

1. The State has fully litigated the extent of its sovereign interest in the fishery, and this binds its fishermen.

The United States and the Indian tribes have prosecuted this action against the State of Washington to vindicate their treaty rights and prevent state-authorized preemption of those rights by the non-treaty fishermen. Although the State Departments of Fisheries and Game have intervened, the State of Washington remains the principal defendant. Washington has vigorously defended its sovereign interest in regulating and preserving the fishery for exploitation by its citizens. *Cf., Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371 (1978) (Burger, C. J., concurring).

This Court recently confirmed the continuing vitality of *parens patriae* in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), holding that a state appropriately represents and binds its citizens in litigation where the sovereign interests of the state are implicated.[422] The Supreme Court of Washington has also recognized the *parens patriae* doctrine as it relates to Washington's sovereign interest in its fish resources. *Washington Kelpers Assoc. v. State*, 81 Wn.2d 410, 502 P.2d 1170 (1972), *Cf., State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936). Moreover, the State legislature has declared that "preservation of the salmon industry and the salmon resources of the State of Washington is vital to the State's economy." RCW 75.18.005. Washington thus acted in its governmental capacity, in

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422. The states act as *parens patriae* in protecting their citizens' interests in clean water, *e.g., New York v. New Jersey*, 256 U.S. 296 (1921), *Missouri v. Illinois*, 180 U.S. 208 (1901); sufficient water, *e.g., Kansas v. Colorado*, 206 U.S. 46 (1907); clean air, *e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); free trade, *e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and preservation of fish, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

defense of its sovereign interests, in this litigation.[423] Clearly when Washington protects its interest in the fishery it also represents the interests of its citizens in the fishery. Under these circumstances, when a State is a party as *parens patriae*, any judgment rendered against the State binds all citizens of the state. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958); *New Jersey v. New York*, 345 U.S. 369 (1953); *Wyoming v. Colorado*, 286 U.S. 494 (1932).[424]

In *City of Tacoma*, this Court considered the *res judicata* effect on state citizens of a judgment against the State of Washington. A judgment was obtained against the State of Washington in a complex series of lawsuits involving construction of a hydroelectric project to supply electricity for the City. The judgment was upheld by the court of appeals and certiorari was denied by this Court. Subsequently, a group of citizens sought to relitigate some of the issues in a second action, and this Court stated:

> The final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings,

423. Members of this Court have expressed in several ways the relation of the State to fish resources within its boundaries. Whether the State's interest in the right to harvest fish and in the fish themselves is described as "common ownership," *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), or as a "power to preserve and regulate the exploitation of an important resource," *Douglas v. Seacoast Products*, 431 U.S. 265, 284 (1977), it is clear that the State's sovereign interests are implicated.

424. The *parens patriae* role is particularly appropriate in the instant case where the litigation focused on the portion of the harvestable fish resource which may be made available to state citizens collectively. In defending this litigation, Washington did not act on behalf of any single citizen group. Rather, the State defended its sovereign interests in the fishery and attempted to maximize the portion of the resource available for exploitation by its citizens.

> and, like it, were bound by the judgment. *Wyoming v. Colorado*, 286 U.S. 494, 506-509 . . . . We conclude that the judgment of the Court of Appeals, upon this Court's denial of the State's petition for certiorari, became final under §313(b) of the Act, and is binding upon the State of Washington, its Directors of Fisheries and of Game, and its citizens, including the taxpayers of Tacoma.

Id.

As the Court of Appeals recognized, the most useful analogy is to a series of Supreme Court cases dealing with apportionment of water rights in interstate rivers and streams:

> States litigate their quasi-sovereign rights to water, and appropriators under the state's laws are bound by those decisions without being parties. [*Nebraska v.* Wyoming, 295 U.S. 40, 43 (1935)] Washington's fishers are its privies in litigation over the State's quasi-sovereign right to its fish in the same way that Wyoming's appropriators are its privies in litigation over the state's quasi-sovereign right to water.

573 F.2d at 1132 n. 15. In a whole series of cases, this Court had held that judgments against defendant states in water apportionment adjudications are binding on individual water users within the state, notwithstanding the fact that they were not joined as parties. The principle is stated clearly in *Wyoming v. Colorado*, 286 U.S. 494, 506-507 (1932):

> We are of the opinion that the record, opinion and decree in the prior suit, here reviewed at length, *show very plainly that the decree must be taken as determining the relative rights of the two States, including their respective citizens*, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion.

286 U.S. at 506-507. (emphasis added) Later in the opin-

ion, the Court specifically addressed the argument raised by the Associations:

> But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of a suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was "not between private parties" but "between the two sovereignties of Wyoming and Colorado"; and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indissolubly linked with those of her appropriators. 259 U.S. 468. Decisions in other cases also warrant the conclusion that *the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree.* (emphasis added, citations omited)

Id. at 509-09.[425]

The same doctrine was applied by this Court in *Arizona v. California*, 373 U.S. 546 (1963), in a situation closely analogous to the one before the Court because of the presence of reserved Indian rights. In that case, the Court held that five Indian reservations enjoyed reserved rights to waters of the Colorado River and that the Indian share of

425. In a similar context, in *Nebraska v. Wyoming*, 295 U.S. 40 (1935), the argument was presented that the Secretary of Interior whose water rights were derived from the State of Wyoming, was a necessary party to an interstate water adjudication. The Court rejected this contention:

> [The Secretary of the Interior's] rights can rise no higher than those of Wyoming, and adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.

295 U.S. at 43. *See also Hinderlider v. La Plata Co.*, 304 U.S. 92, 107-08 (1938); *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

the water was to be charged against the apportionment of the states in which the reservations were located. 373 U.S. at 601. The Court's decree carrying into effect its opinion makes it evident that the Court contemplated that its adjudication would be directly binding not only upon the states that were parties to the litigation, but also upon the individual water users within the respective states. The Court enjoined "the States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, . . . and all other users of water from the mainstream in said States, their officers, attorneys, agents, and employees . . ." 376 U.S. 340, 347. In light of the Court's decree, no credible argument can be made that the allocation decreed in favor of the tribes was not binding against individual non-party water users in the state.[426]

The analogy between the water apportionment cases is furthered by the fact that in the water allocation cases the Court's task has been simply to determine the apportionment of water between the sovereigns involved in the litigation, but not among individual citizens of the sovereign. Therefore, the goal of each of the states in the litigation, in representing its citizens, is to maximize the amount of water that is available for its water permittees

426. *Arizona v. California* exemplifies that the presence of Indian tribes in adjudications of this type does not prevent the Court's judgment from having its *res judicata* effect on citizens of the state. As the tribes have described in Section III, *supra*, this litigation involves allocation between sovereign interests. This explains why the State does *not* represent the interests of the treaty tribes although it acts as *parens patriae* for its citizens, *see* Associations' Br. at 59. The tribal government entities have rights which are entirely distinct from those of individual state citizens. The Gillnetters answer their own argument elsewhere in their brief when they say, "The Indians superior freedom to fish today arises merely because the State of Washington succeeded to the plenary powers of the federal government over only non-Indian citizens of the Territory when the State was admitted to the Union." Associations' Br. 28, n. 18.

to use. Similarly, in *United States v. Washington*, the State has attempted to minimize the treaty allocation, and maximize the total number of fish made available to its licensees. No questions have been presented as to the sharing of the total allocation made available to state licensees among themselves. Although sport fishermen, trollers, and gillnet and purse seine commercial fishermen all have distinct interests, no questions as to any allocation among those groups' interests is presented by this litigation.

Underlying the doctrine of *parens patriae* is a policy of preventing precisely the kind of protracted, expensive litigation which is represented by the non-treaty fishers' collateral attacks on the District Court decision in this case.

> The principle is a necessary recognition of sovereign dignity as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and *there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.*

New Jersey v. New York, supra, 345 U.S. at 373. (emphasis added) No adjudication allocating rights to take water or fish would be immune from chaos and "total frustration," *cf., Puyallup III,* 433 U.S. 165, 176 (1977), were not states deemed to stand in the relation of *parens patriae* to their citizens on matters affecting sovereign interests.

Further, the propriety of Washington representing its citizens in this litigation is especially clear as applied to its licensed fishermen. The State's relation to these citizens is even closer than its relation to unidentified future fish appropriators. Because of their licensee/licensor relationship, the non-treaty commercial fishermen represented by the Associations are in privity with Washington.

The non-treaty fishermen clearly have a successive relationship to a right possessed and regulated by the State of Washington. At common law the right to harvest wild fish, as *ferrae naturae,* belongs to all citizens of the state collectively, but the state in its capacity as sovereign holds the right to take fish in trust for the citizens' benefits. *Geer v. Connecticut,* 161 U.S. 519 (1895). For the individual citizen, the ability to take fish legally is a privilege, granted exclusively by the sovereign. It is not a right granted or reserved by the individual. Id., at 533-34. Under state law, "[f]ishermen have no private property rights in taking salmon." *Washington Kelpers Assoc. v. State,* 81 Wn.2d 410, 415, 502 P.2d 1170 (1972), *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936). The privilege exercised by the non-treaty fishermen is wholly derivative of the State's right. Washington State grants its citizens the privilege of fishing by licensing them: no non-treaty citizen may fish who is not licensed by the State and no licensee may fish except as permitted by the licensor. The permanent regulations of the Director of Fisheries provide:

> It shall be unlawful to take, fish for [or] possess . . . fish . . . in or from any of the waters . . . of Washington . . . except at the times, places and in the manners . . . provided for in the regulations of the Department of Fisheries.

Wash. Admin. Code 220-010(1). A better example of two parties in privity,[427] where one controls the other, is hard to imagine.[428]

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427. *See also* the recent refinement of the RESTATEMENT OF JUDGMENTS which very explicitly recognizes that a non-party may be bound by a judgment if he is represented by a governmental entity. RESTATEMENT OF JUDGMENTS §85(1)(d) (Tent. Draft No. 2, 1975).

428. The non-treaty fishermen's assertion that "the rights and interests of non-treaty commercial fishermen, . . . stand quite independent of the

[Footnote continued on page 194]

Privity in this sense provides firm ground for injunctions which bind the fishermen although they are not named parties. As the Court noted in *Regal Knitwear v. N.L.R.B.*, 324 U.S. 9, 14 (1945):

> [A] decree of injunction not only binds the parties defendant but also those *identified with them in interest,* in privity with them, represented by them or *subject to their control.*

(emphasis added) In both *Regal Knitwear* and, more recently, in *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973), the Court upheld federal remedial orders extending not only to those persons specifically named in F.R.C.P. 65(d), but also to "successors and assigns" of those persons. The Court looked beyond mere form to the actual relations of the entities in order identify "successors." As noted above, a similar relationship exists here.

In these cases, Washington State plainly did and does represent the rights of non-treaty fishermen.[429] Even the briefs to this Court demonstrate this identity of interest. Washington has filed an extensive brief examining the intention of the treaty parties, the effect on non-treaty fisheries and concluding that no allocation can be made for treaty right fisheries. The non-treaty fishermen simply

State's sovereign rights," Associations' Br. at 73, is quite simply wrong. The non-treaty organizations argue that the limitation imposed by the State upon the number of salmon licenses elevates their property interest in the license to an interest separate from that held by all citizens as a whole. However, not only was RCW 75.28.450 enacted *following* Final Decision No. 1, but this argument simply falls in light of the water cases. The existence of limited amounts of water has never been held to vest in state permittees a property right separate from that of any other citizen which would support intervention or a separate action to challenge the enforcement of the decree. Moreover, the fact the licenses are issued to the fishermen by virtue of the State law only serves to emphasize the purely derivative nature of their "rights" and their privity with the State of Washington.

429. *E.g.*, Transcript August 21, 1978, at 80-85.

adopt and reiterate the State's arguments.[430] In fact, their views differ only on the collateral question of the Department of Fisheries' state law authority. Associations' Br. at 54-55, n. 44.

Finally, the Associations argue that they have not been adequately represented by the State. Associations' Br. at 57 *et seq.* This contention is without merit. A strong presumption exists that a state adequately represents the interests of its citizens. Wright and Miller, *Federal Practice and Procedure,* §1909 (1972). *See also Leach Lake Area Citizens Committee v. Leach Lake Band Of Chippewas,* 486 F.2d 888 (8th Cir. 1973).

The sincerety of this argument is belittled by their reliance on the arguments raised by the State. As they comment on the effectiveness of the State's argument: "The State has *convincingly demonstrated* on the basis of historical evidence that . . . ." Associations' Br. at 32.[431]

430. Since the commencement of this action, the Washington Department of Game has consistently taken the position that there is no treaty right to a separate fishery, thus effectively representing citizens whose views differed from the earlier, slightly more accommodating, proposals of the Washington Department of Fisheries, *cf., City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 326 (1958) and Associations' Br. 65. The State of Washington reaffirms this hard-line stance before this Court, as it did before the Court of Appeals.

The basic issue throughout this litigation has always been how harvest opportunity is to be divided between treaty and non-treaty fishermen. The record is devoid of suggestions that the State has represented one group of licensees to the detriment of another. The actual allocation of harvest between non-treaty sport and commercial fishermen is a direct and intended result of other state regulatory decisions.

431. The Associations did not even seek to raise this issue before the District Court. Instead they attacked the judgment collaterally in state court, where neither the tribes nor the United States were parties. Associations' Br. at 62 n. 50. As they admitted frankly, they "foresaw the futility of intervention once the [District] Court had established its pattern." Second Supp. Brief of Petitioners, 9th Circuit No. 77-3129, now No. 77-139. Such avoidance of clear federal law and jurisdiction has not been and cannot be countenanced. *Southwest Airlines v. Texas International Airlines,* 546 F.2d 84 (5th Cir. 1977).

2. The District Court acted properly, pursuant to the All Writs Act, in enjoining non-parties from interfering with its judgment.

The State and its non-treaty licensees have consistently resisted the decrees, orders and injunctions entered by the District Court, *see* 573 F.2d 1123, 1126 (9th Cir. 1978), App. A-2-3, Petition in No. 78-119, and *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978), *cert. pending*. This section will discuss the breadth of the District Court's power to protect the federal rights which it has enunciated, the similarity of this and numerous school desegregation cases, and an alternate legal theory under which the District Court may protect the peaceful enjoyment of property partitioned by the court.

Because the District Court adjudicated public, not private, rights it may take broad action to protect these rights. The fishing rights litigation involves interpretation of treaties between sovereigns: the United States on one hand and self-governing Indian tribes on the other. The parties to the treaties are in agreement as to the meaning. This Court is presented with the anomalous situation in which a third party, the State of Washington, whose rights are only derivative of the rights of the United States, seeks to undermine the understanding of the parties to the treaty. The public nature of this controversy gives the District Court much wider latitude in granting relief against parties and non-parties than it would have in an action concerning private rights. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 179-80 (1973), citing *Virginia Ry. Co. v. System Federation*, 300 U.S. 515, 552 (1937).

Where constitutionally guaranteed public rights are concerned, this Court has held that the remedies needed to

protect these rights must be broad, flexible and imaginative, even if these remedies infringe upon the activities of persons not party to the original action which declared the rights. *Hutto v. Finney*, — U.S. —, 98 S.Ct. 2565 (1978); *Bell v. Hood*, 327 U.S. 678 (1946); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

Like the school desegregation cases, the fishing rights decisions have led to unusual, widespread disobedience of the court orders. When district courts which issued orders designed to remedy segregated schooling encountered similar resistance, this Court strongly endorsed supplemental district court action to ensure compliance with the court orders. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Swann, supra; see also United States v. Hall*, 472 F.2d 261 (5th Cir. 1972).[432] The Court should take similar action here. The All Writs Act, codified at 28 U.S.C. §1651 (1966), was specifically designed for such situations and its use is particularly appropriate where, as here, the non-treaty fishermen are in privity with a state which has already fully litigated its sovereign interests in the fish resources. The illegal fishing by the State's licensees has brought about the very preemption and disregard of federal rights which the State was ordered to halt. The fishermen's conduct prevents

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432. Petitioners attempt to avoid the clear analogy between their conduct and that described in *Hall* by branding Hall as an "agitator" who was not a party to the underlying case and whose rights were not adjudicated in the original desegregation decision. Associations' Br. at 69-70 n. 56. In light of the record here, replete with deliberate disobedience of federal court orders, *see* Joint App. 516-17; 528-29; 599-609; Transcript Nov. 3, 1978; *United States v. Olander, supra*, at least some members of the trade organizations can fairly be characterized as "agitators." Additionally, the court in *Hall* expressly found that the rights of *all of the community, including Hall*, were adjudicated in the underlying action. 472 F.2d at 267.

Washington from making the reductions in fishing which the Court has ordered, 384 F.Supp. at 420, ¶5, Joint App. 230, and from respecting the federal reserved right.

When the established public rights of parties are threatened by the actions of non-parties, the district court may fashion any remedies necessary to protect the enjoyment of the party threatened. These remedies may include limits on the actions of non-parties and eventual prosecution of the non-parties for contempt of the limitation order. The law on this subject is so clear[433] that the non-parties' continuing

433. *Doe v. Ceci*, 517 F.2d 1203 (7th Cir. 1975) (injunction against state court judge to prevent enforcement of a judgment obtained by a non-party doctor, which obstructed the federal defendant's compliance); *United States v. Texas*, 356 F. Supp. 469 (E.D. Tex. 1972), *aff'd.* 495 F.2d 1250 (5th Cir. 1974) (injunction against state court order, obtained by parents, which frustrated school district's ability to comply with federal court's previous school transfer judgment); *Newburg Area Council, Inc. v. Board of Education*, Nos. 7045 and 7291 (W.D.Ky., July 30, 1975), previous opinions at 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), *mandamus issued*, 521 F.2d 578 (6th Cir. 1975)) (district court orders specifying what persons who wished to protest desegregation decision could and could not do; later prohibiting protest demonstrations altogether); *In re Curtis' Petition*, 240 F. Supp. 475 (E.D.Mo. 1965), *aff'd.* 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967) (civil rights demonstrators with actual notice of restraining order not entitled to writ of habeas corpus following contempt convictions though they were neither named defendants nor members of the class restrained by the injunctions); *Lucy v. Adams*, 224 F. Supp. 79 (N.D.Ala. 1963), *aff'd. sub nom. McCorvey v. Lucy*, 328 F.2d 892 (5th Cir. 1964) (injunction against named university dean bound successor in office who had knowledge); *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957), *cert. denied*, 335 U.S. 834 (1957) (affirming contempt conviction of non-party who was served with temporary restraining order to prevent interference with operations of federal defendants' integrated school); *Bullock v. United States*, 265 F.2d 683 (6th Cir. 1959), *cert. denied*, 360 U.S. 909 (1959) (affirming contempt conviction of non-party participating with another non-party against whom restraining order had previously been issued); *National Labor Relations Board v. Sunshine Mining Co.*, 125 F.2d 757 (9th Cir. 1942) (injunction against non-party creditor action which interfered with N.L.R.B.-ordered employer payments to employees); *Russell v. United States*, 86 F.2d 389 (8th Cir. 1936) (criminal contempt conviction proper where defendant, in no way connected with underlying legal dispute, obstructed marshall replevying goods pursuant to court order);

denial of the District Court's power can fairly be characterized as outlawry, *see* Joint App. 499.

Finally, the District Court acted *in rem* in partitioning the right to take fish, and it retains jurisdiction over the *res* to the extent necessary to prevent interference with the partition. *United States v. Washington* is an *in rem* action to divide the property right in the taking of fish. 520 F.2d at 687-88, Joint App. 50; 573 F.2d at 1126, 1128, App. A-2, 4, 7, Petition in No. 78-119. The label "*in rem*" properly applies to a wide variety of actions where the court, in order to give effect to its jurisdiction, must control the property. *See* 1A Pt. 2 *Moore's Federal Practice*, ¶0.214 (1978). Of necessity, the scope of *in rem* injunctions must

Minerich v. United States, 29 F.2d 565 (6th Cir. 1929), *cert. denied*, 279 U.S. 843 (1929) (non-party, not a striker, held in contempt for urging violation of an injunction directed to striking coal miners, on a finding that he had knowledge of the injunction); *United States v. Crookshanks*, No. CR-77-168 (D.Ore. Nov. 30, 1977) (contempt conviction of non-party fisherman violating injunction issued to protect court's allocation between Indian tribes and states); *Mims v. Duvall County School Board*, 338 F. Supp. 1208 (M.D.Fla. 1971), *subsequent opinion*, 350 F. Supp. 553 (M.D.Fla. 1972) (injunction against demonstrators to prevent non-party disruption of school integration); *Montgomery County Board of Education v. Shelton*, 327 F. Supp. 811 (N.D. Miss. 1971) (injunction against state court proceedings, brought by non-parties and others, which interfered with an existing federal order regarding desegregation demonstrations); *Coffey v. Braddy*, 372 F. Supp. 116 (M.D.Fla. 1971) (court may enjoin persons not before the court who, having actual notice of the federal affirmative action proceeding, seek to block city department's efforts to comply with decree); *State ex rel. Flowers v. Robinson*, 8 Race Rel. L. Rep. 848 (Etowah Co., Ala. Cir. Ct. 1963, No. 16,743) (sheriff may enforce injunction prohibiting named persons "and all persons having notice of this order" from obstructing traffic during demonstrations); *Abercrombie Enterprises v. Opton*, 7 Race Rel. L. Rep. 565 (Durham Co., N.C. Sup. Ct. 1962) (theater owner entitled to injunction prohibiting trespassing and interference with clientele by named civil rights activists and others with notice or knowledge of the order); *see also In re Debs*, 158 U.S. 564 (1895) cited with approval in *United States v. Barnett*, 376 U.S. 681 (1964); and Garrigan v. United States, 163 F.16 (7th Cir. 1908), *cert. denied*, 214 U.S. 514 (1909).

be broad, *cf., Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973).

The treaty right of taking fish is meaningless if certain fishermen destroy the fish before the holder of the right, the tribes, has an opportunity to exercise it. The broad relief granted by the District Court was designed and is necessary to prevent just such destruction or diminishment of fishing opportunity.[434]

V. The State Supreme Court cases Do Not Present A Justiciable Case or Controversy Under Article III of the United States Constitution, and Are Void for Other Procedural Errors. In Addition, the State Court Decision That It Lacks Power to Recognize Treaty Rights In Its Regulation of the Washington Salmon Fisheries Must Fall Under the Supremacy Clause

> For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The State 'must. . . yield to an authority that is paramount to the State."

434. Under these circumstances a decree of injunction issued to protect the property right before the court can lawfully bind third parties. *See In re Lustron Corp.*, 184 F.2d 789, 798 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951); *Board of Governors v. Transamerica Corp.*, 184 F.2d 311, 315 (dicta) (9th Cir. 1950); *Zeleznik v. Grand Riviera Theater Co.*, 128 F.2d 533 (6th Cir. 1942); *Converse v. Highway Construction Co.*, 107 F.2d 127 (6th Cir. 1939); *Cherry v. Insull Utility Investments, Inc.*, 58 F.2d 1022 (N.D. Ill. 1932), *rev'd. on other grounds sub nom. Guaranty Trust of New York v. Fentress*, 61 F.2d 329 (7th Cir. 1932); *Rivera v. Lawton*, 35 F.2d 823 (1st Cir. 1929); *Havner v. Hegnes*, 269 F. 537 (8th Cir. 1920); *City of Fresno v. Edmonston*, 131 F. Supp. 421 (S.D.Cal. 1955) (enjoining a non-party irrigation district and others from defeating federal jurisdiction by a state administrative proceeding where the right to appropriate water was the *res* before the court); *In re Portland Electric Power Co.*, 97 F. Supp. 903, 914 (D. Or. 1947); *United States v. Dean Rubber Mfg. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946); 7 MOORE'S FEDERAL PRACTICE, ¶65.13, n. 1 (1978); and *see Lamb v. Cramer*, 285 U.S. 217 (1932) (removal of part of the *res pendente lite* adjudged contempt).

Justice Frankfurter concurring in *Cooper v. Aaron*, 358 U.S. 1, 22 (1958).

The State Supreme Court decisions are, of course, an outrage. *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977) was rendered on June 9, 1977, well after the District Court's decision in *United States v. Washington* became final following this Court's denial of certiorari in 1976. *Fishing Vessel Association v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977), was decided by the state Supreme Court in November 1977, after *Puyallup III*, and after a pattern of massive non-treaty illegal fishing in violation of the orders of the federal District Court had developed. In the context of the events that were then occurring on the waters of Puget Sound, the decision was especially obnoxious. Its holding that the final decision of the District Court was illegal and unconstitutional gave tremendous encouragement and, in effect, legal sanction to the outlaw fishing that was then occurring. As dissenting Justice Utter stated:

> I am convinced that, whatever may be the personal inclinations of the members of this court, continued refusal to accept the legal principles enunciated in . . . *Puyallup II* . . . *Puyallup III* and *United States v. Washington, supra*, will place upon us significant responsibility for whatever unfortunate events hereafter transpire.

89 Wn.2d at 288, 571 P.2d at 1379-80.

It is quite clear that the state Supreme Court was primarily motivated by a desire to prevent implementation of the Indian treaty rights as adjudicated by the federal courts. Not only was the State court utterly lacking in any sense of comity for the prior judgments of the federal courts concerning the same subject matter, but as Justice

Horowitz recognized in dissent, the State court in *Puget Sound Gillnetters v. Moos* actively invited the Director of the Department of Fisheries to violate the prior injunction of the United States District Court, 88 Wn.2d at 697, 565 P.2d at 1161.

Although the state court decisions have addressed a number of federal issues, including the scope and meaning of the treaties and whether the District Court's interpretation of the treaties denies non-treaty fishermen equal protection of the laws, the State cases are so saturated with procedural errors that they do not provide a suitable vehicle to reach any of the substantive issues regarding the meaning of the treaty or the correctness of the District Court's orders. Further, the State and the Associations, in challenging the District Court's interpretation of the treaties and subsequent orders, raise the same arguments that were utilized by the state Supreme Court. To the extent that this Court reaches those cases at all, therefore, the federal cases should be utilized to resolve those questions, not only because the tribes and the United States are parties, but also because of the adequacy of the record in the federal proceedings, and the lack thereof in the state court proceedings.

However, the issue of whether the state court decision itself, apart from its procedural defects, can be squared with the Supremacy Clause is presented *only* by the state court cases. Accordingly, the Tribes will address that issue in this brief.

A. *The Holding of the State Supreme Court That State Officials Lack Authority to Implement the Treaty Rights Were Based on Federal, Not State Law, and Should be Reversed.*

Before discussing the impact of the Supremacy Clause on the State's asserted state law defense to implementation of the federal rights, it is first necessary to determine whether this is really a *state law* issue. This is not a simple task in light of the state court's confusing analysis.

Puget Sound Gillnetters and *Tollefson* appear to have held that the Department of Fisheries lacks authority under state law to pass any regulations whose purpose was to allocate to the Indian treaty fishermen any portion of the harvestable salmon runs. Notwithstanding the holding that the Department lacks authority to allocate fish between state commercial and Indian commercial fisheries, the actual *effect* of the state regulations has clearly been to allocate a substantial portion of the resource to the non-treaty fishery, at the expense of the treaty tribes. They have accomplished this by affirmatively authorizing the harvest of fish before they reach their usual and accustomed grounds. *See* Part II, *supra*. In effect the state Supreme Court in *Puget Sound Gillnetters* held that the Department of Fisheries had a statutory *duty* to authorize this "first come, first serve" method of regulation:

> Reading those statutes together, it will be seen that the department has the statutory duty to authorize the harvesting of salmon not required for natural or artificial spawning. It is clear, therefore, that the Department may restrict the harvesting of salmon by commercial fishermen only to the extent that no surplus exists and that the restriction is necessary to prevent the impairment of the supply of salmon.

88 Wn.2d at 682, 565 P.2d at 1153, Petition No. 77-983, App. D at 6.

Moreover, as the State points out at pages 97-98 of its brief, and as the state Supreme Court recognized, the State Department of Fisheries does in fact "allocate" fish between different groups of fishermen.[435] The State argues that this is for the purpose of "conservation" in the sense that it promotes an orderly fishery:

> In order to avoid such anarchy on its waters and the attendant destruction of salmon runs for future years, the Department of Fisheries divides the state's territorial waters into geographic fishing zones, and sequentially opens and closes these zones to different types of fishing gear. By manipulating fishing times and gear limitations for each zone, the Department is able to insure a fair opportunity for all fishermen to participate in the fishery, and thereby obtains the fishermen's respect for and compliance with its conservation regulations.

State Br. at 101. The state Supreme Court in *Puget Sound Gillnetters* said that this "allocation" was lawful because

> [c]lassification which distinguishes between commercial and non-commercial fishermen has a reasonable basis in fact, which is related to the legitimate governmental purposes of conservation and promotion of the economic welfare of the state. [On the other hand.] [d]istinctions between fishermen based upon their race or ethnic background are not proper.

88 Wn.2d at 684, 565 P.2d at 1154, App. D at 8. Similarly, as Justice Utter noted in dissent:

> It cannot seriously be argued that the Director of the Department of Fisheries lacks power to allocate fish between distinct and competing user groups for pur-

435. It should be noted that RCW 75.12.010 specifically authorizes the Director of Fisheries to allocate between gillnet and purse seine gear. The statute provides in part:

> [T]he Director may maneuver units of lawful gillnet and purse seine gear in any number of equivalents at his discretion, by time and area, to fully utilize such harvestable portions of these salmon runs for the economic well being of the citizens of this state. . . .

Quoted in *Puget Sound Gillnetters, Id.*, 565 P.2d at 1153.

> pose of conservation and systematic exploitation of the resource. Such allocation has been the principal effect of Department regulations for many years.

Tollefson, 89 Wn.2d at 288, 571 P.2d at 1380, App. B at 13.

In sum, according to the State of Washington and its Supreme Court, any regulation whose purpose is to allocate fish between user groups can be sustained as necessary for "conservation" on the ground that its purpose is to promote an "orderly fishery," *unless* the regulation is designed to make fish available for Indians. The Washington Supreme Court held in *Puget Sound Gillnetters v. Moos* that Indian fishermen are in the same class as non-treaty fishermen and that any regulation designed to make fish available to them unlawfully discriminated among fishermen of the same class. *Puget Sound Gillnetters v. Moos*, 88 Wn.2d at 684, 565 P.2d at 1154, App. D at 8. Or, as the state Supreme Court in *Tollefson* characterized the issue raised in *Puget Sound Gillnetters v. Moos:*

> Does the Director of the Department of Fisheries have the statutory power to make an unequal allocation of fish among members of the same class of user?

89 Wn.2d at 279, 571 P.2d at 1375, App. B at 4.

It is apparent, the tribes believe, that the attempt to characterize the issue as one of *state* law power to "allocate" is a subterfuge. In reality, the Washington Supreme Court has determined *federal* law issues: Whether it is consistent with the treaties to distinguish between treaty and non-treaty commercial fishermen, and whether it is unconstitutional to promulgate regulations designed to make a share of the harvest available to the treaty fishermen. The Court's answers to these questions turn on its interpretation of the treaties and of the Equal Protection

Clause, not upon the state court's construction of Title 75 of the Washington statutes.

These issues, however, have already been adjudicated in the District Court. Regardless of what effect a federal court judgment might have in the state courts on a question of *state* law, it is clear that federal court determination of such federal law issues is binding on the state court since the State was a party and the court a state instrumentality. This would be the case even if the purported federal defense was not raised by the State in the federal litigation. As this Court held in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948):

> The rule [of *res judicata*] provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which has been offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose,' . . . The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

The state Supreme Court has improperly failed to give *res judicata* effect to the District Court's judgment on the *federal* law issues on which it based its decision. Accordingly, its inaccurate characterization of its ruling as *state* law cannot be used to shield the State from its duty to implement the decision.

B. *The State of Washington and its Department of Fisheries Must Manage and Regulate the Fisheries Under its Jurisdiction so as to Insure That Federally-Guaranteed Treaty Fishing Rights Are Protected: The State Court Judgments, Which Prevent and Obstruct Such Enforcement of the Federal Rights, Are Void Under the Supremacy Clause*

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States; *shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.*
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, *and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution.*
>
> . . .

U.S. CONST. art. VI (emphasis added).

In the alternative, even if the state court's characterization of its decisions as being based on *state law* is correct, the decisions must nevertheless be reversed. The State-imposed limitation on the power of State officials directly interferes with the enforcement and protection of federal rights which are the supreme law of the land and the limitations are, therefore, void. In light of the arguments raised by the Associations, it must be emphasized that this issue does not concern the power of the federal court to order state officials to act beyond their power under state laws; instead, the issue is the validity of the state limitation on the power of state officials to give recognition to the federal right.

The tribes do not dispute that the state court is the final

arbiter of the meaning of state law. Similarly, since the agencies of the state are creatures of state law, the extent of their authority under state law is a state law question. However, the Washington Supreme Court went further and held that "[t]he judicial determination of a state official's authority to act is solely and exclusively within the jurisdiction of the state courts." *Puget Sound Gillnetters*, 88 Wn.2d at 689, 565 P.2d at 1157, App. D at 13. This statement is wrong on two counts: First, it is not the case that the only source of a state officer's powers and duties is state law; a state officer is obligated to honor and protect federal rights. Second, the statement is invalid in the context of a federal court decision which had already held that the state action would lead to a denial of a federal right. As the United States Supreme Court stated in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960):

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument of circumventing a federally-protected right. . . . [This lack of insulation] has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition."

The Supremacy Clause of the United States Constitution is itself, a direct restraint on the actions of state officials and imposes upon them certain obligations. It must be emphasized that the Supremacy Clause makes federal laws and treaties the supreme law of the land, binding on the judges of every state, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. In addition, art. VI specifically requires

all state executive and judicial officers to "be bound by an oath or affirmation to support this constitution."

In determining the applicability of the Supremacy Clause to the state Supreme Court, it must be recalled that the State of Washington is not acting in a neutral manner in its regulation of the fisheries. The *effect* of state regulation with respect to Indian treaty rights has been to affirmately authorize the taking of fish by non-treaty citizens *before* the fish reach the usual and accustomed grounds of the treaty tribes. As noted above, the state court has held that the Department of Fisheries is *required* to do this since it cannot prohibit commercial fishing until such time as a conservation danger is presented. State power is clearly being used here "as an instrument for circumventing a federal right." *Gomillion v. Lightfoot, supra.*

It is well established that if state officials act at all, they can be required to act in accordance with the guarantees of the Constitution. This may include imposing duties upon them which are beyond the duties required by state law, or even in violation of state law; these duties are, in effect, federal duties.

In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1946), for example, Prince Edward County had closed all public schools of mixed racial enrollment. Suit was brought against the school district for refusing to operate the system of public free education in Prince Edward County and to enjoin the payment of public fees to help support private racially-segregated schools. The Virginia Supreme Court had held that, as a matter of state law, the County had an option of operating or not operating public schools. The United States Supreme Court held this determination to be "a definitive and authorita-

tive holding of Virginia law, binding on us." 377 U.S. at 230. However, the Court nevertheless held that closing of the schools operated to deny petitioners equal protection of the laws. The Supreme Court affirmed the District Court order enjoining the County from its public funding of private schools and approved an order requiring the County to reopen the public schools and assess taxes to finance them. In other words, notwithstanding the correctness of the County's assertion that it had complied with state law, the County was required to overcome the additional hurdle of complying with obligations imposed by the United States Constitution.

Similarly, this Court, has in numerous instances held that state-imposed limitations on an official's power are not a barrier to the official's obligation to implement federal rights. For example, in *Ward v. Board of County Commissioners,* 253 U.S. 17 (1920) the Court held that a tax exemption held by an Indian, determined by the federal courts to be a vested property right, gave an Indian a federal right to a tax refund notwithstanding the inconsistent provisions of state law. The Court, after referring to its previous holdings that a tax exemption existed, stated:

> This being so, the State and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love County, no matter what was said in local statues.

253 U.S. at 21.

Similarly, in *Testa v. Katt,* 330 U.S. 386 (1947), the Rhode Island Supreme Court had held that it was not obligated to enforce a federal statute which was considered a "penal law" under state law. The Supreme Court, after

accepting the state law characterization as binding on it, unanimously held that it

> makes no difference in which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitutes a nation. It disregards the purpose and effect of Article VI, §2 of the Constitution. . . .

330 U.S. at 389. Having established a forum in which state law could be enforced, the Rhode Island court was obligated to enforce federal law, notwithstanding any state law prohibition. Similarly, having undertaken to regulate the fisheries, the State of Washington is affirmatively obligated to regulate them in such a manner as to give recognition to federal rights, notwithstanding any contrary provision of state law.

Similar problems have, of course, arisen numerous times in the desegregation cases following *Brown v. Board of Education,* 347 U.S. 483 (1954). In *Brown* itself, state laws affirmatively requiring segregated schools were involved. 347 U.S. at 486-88, n. 1. Typical was *North Carolina Board of Education v. Swann,* 402 U.S. 43 (1971), which arose when the State of North Carolina had enacted an anti-busing bill. The Court stated:

> The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important, the statute exploits an apparently neutral form to control

> school assignment plans by directing that they be "color blind;" that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

402 U.S. at 45. The parallel to the instant case is virtually complete. The state law, as interpreted by the state court, prohibits the state from considering the existence of Indian treaty fishing rights in regulating the fishery. Although the State declaration is apparently "neutral" on its face, it has the clear effect of allocating an inappropriate share of the resource to the non-treaty fishermen in violation of the treaty right.[436]

The state court decree operates to, and was designed to, obstruct the implementation of the remedies granted by the District Court in *United States v. Washington*. As the United States Supreme Court held in *Green v. County School Board*, 391 U.S. 430, 437-38 (1968), once a district court's order becomes final within the federal system, state

436. *See also Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958); *Bush v. Orleans Parish School Board*, 187 F. Supp. 42, 45 (E.D. La. 1960), *aff'd* 365 U.S. 569 (1961); *Bush v. Orleans Parish School Board*, 190 F. Supp. 861, 864 (E.D. La. 1960), *aff'd sub. nom. City of New Orleans v. Bush*, 366 U.S. 212 (1961); *Bush v. Orleans Parish School Board*, 194 F. Supp. 182 (E.D. La.) *aff'd sub nom. Tugwell v. Bush*, 367 U.S. 907 (1961) and *Gremillion v. United States*, 368 U.S. 11 (1961); *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649, 652 (E.D. La. 1961), *aff'd* 368 U.S. 515 (1962); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 837 (E.D. La. 1967), *aff'd* 389 U.S. 71 (1968); *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809).

officials become "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. *Accord, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Cooper v. Aaron*, 358 U.S. 1, 7 (1958).[437]

In conclusion, if this Court looks to the substance of the state court decisions they must be overruled since "no state legislature or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), relying on the Supremacy Clause.

C. *Neither Puget Sound Gillnetters v. Moos nor Washington State Commercial Passenger Fishing Vessel Association v. Tollefson Presents a Justiciable "Case or Controversy" Reviewable Under Article III of the Constitution of the United States, Because of the Lack of Adversity Between The Parties.*

If this Court is inclined to review any aspects of the federal court interpretation of the treaties as adjudicated in Final Decision No. 1,[438] the Washington State Supreme

437. *See also Jackson County Board of Commissioners v. United States*, 308 U.S. 343 (1939), where this Court stated in dictum that a federal court was not precluded from ordering a county to pay interest on taxes unlawfully assessed against Indian lands, notwithstanding state law to the contrary:

> Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated. . . . The State will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights.

308 U.S. at 350. *Cf., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). *See also Amicus Brief* of the American Civil Liberties Union, discussing these matters in somewhat more detail.

438. The tribes contend that these issues are *res judicata* in both the state and federal courts. *See* Section I, *supra*.

Court decisions do not provide a suitable vehicle to do so. Neither decision is a justiciable "case or controversy" within the meaning of art. III because of the lack of adversity between the parties. *See generally, Flast v. Cohen*, 392 U.S. 83, 94 *et seq.* (1968).

The requirements of a constitutionally justiciable "controversy" have been stated by the Court as follows:

> A 'controversy' in this sense must be one that is appropriate for the judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

The fundamental barrier to the justiciability of the Washington State Supreme Court cases is their collusive nature and lack of adversity. Not only are the State of Washington and the non-treaty fishermen not adverse to one another, but as made clear by the previous section, they are identified in legal interest. The Washington State fishermen are represented by the State of Washington in a *parens patriae* sense, and, as licensees of the State of Washington, they derive their privilege to fish solely from the State. As discussed above, the State of Washingthon and the Associations have taken exactly the same position regarding the interpretation of the treaties and continue to make the same arguments before this Court.

The tribes do not suggest that the State cases are collusive in the sense that an actual conspiracy existed between the Associations and the State to bring the actions, or that one side is paying the attorney fees for the other. Rather, the cases are collusive in the sense that the parties are not adversaries because they desire the same result. As the State's petition in No. 77-983 quite clearly demonstrates, the State of Washington, although it has petitioned for review, seeks not a reversal but an affirmance of the state Supreme Court decisions. Where, as here, both litigants desire precisely the same result there is no case or controversy within the meaning of art. III. *See* Wright, *Law of Federal Courts*, §13 at 40 (3d ed. 1976), citing *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971). *See also Chicago Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1882); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 254 *et seq.* (1850).

The State Supreme Court, in effect, decided *Puget Sound Gillnetters* and *Tollefson* in a legal vacuum. There was no adversary development of a factual record or vigorous presentation of the relevant legal arguments.[439]

In *United States v. Johnson*, 319 U.S. 302, 305 (1943), this Court, in a *per curiam* opinion, succinctly stated the reasons for the prohibition on litigating such collusive lawsuits:

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439. The tenor and vigor of the State's arguments that the State courts should give recognition to the prior decision of the federal courts can be gleaned from the State's Brief in Response to Application for Writ of Mandamus, *Puget Sound Gillnetters Association v. Moos* at 2-3:

> At the outset, it must be known that Fisheries and the undersigned counsel do not believe some of [their] arguments to be correct on the law. . . . Again, Fisheries remains hopeful that some of these issues may be argued with more conviction by the tribes and the United States Government than can be done by Fisheries here.

> Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensible to adjudication of constitutional questions by this Court.

The state cases possess all of the attributes of a collusive lawsuit and none of a justiciable "case or controversy" within the meaning of art. III. The case was tried on a statement of facts stipulated by the State and the non-treaty Associations. Virtually all of the arguments raised by the Gillnetters have been relied upon by the Department of Fisheries in *United States v. Washington.* Although these procedural defects were specifically called to the attention of the Washington Supreme Court by the tribes as *amicus curiae, see* Brief of *Amicus Curiae,* October 25, 1976, in *Puget Sound Gillnetters Association v. Moos,* No. 44401 at 12-16, they received no mention by the Court in either opinion.[440]

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440. Ironically, the state court did not even follow *State,* much less *federal* law. In *Fishing Vessel Association v. Tollefson,* 87 Wn.2d 417, 553 P.2d 113, 114 (1976), the Court noted that it did not issue advisory opinions because of the risk that the question may not have been adequately developed or argued. *See also State ex rel. O'Connell v. Dubuque,* 68 Wn.2d 553, 558, 413 P. 2d 972 (1966) where the state court, in outlining the elements of a justiciable controversy, stated:

> [t]he proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution.

D. *The United States and the Tribes Were Indispensable Parties to the State Court Litigation but, Because Of Their Sovereign Immunity Could Not be Joined. The State Court Adjudication of the Issues Concerning The Scope and Meaning of the Treaty in the Absence of The Tribes and the United States Denied Them Due Process of Law.*

The Indian tribes and the United States could not have been joined in the state court proceedings without their consent. *See Puyallup III, supra,* 433 U.S. at 172-73. *See also Turner v. United States,* 248 U.S. 354, 358 (1919); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). In their *amicus curiae* brief filed with the state Supreme Court in *Puget Sound Gillnetters v. Moos,* No. 44401, the tribes pointed out that they could not be joined and were "indispensable" parties within the meaning of State Rule of Civil Procedure 19(b), which is identical to Federal Rule of Civil Procedure 19(b).

The Washington Supreme Court made no mention of this argument. While the state court is presumably free to interpret State rules of civil procedure, the failure to join an indispensable party obviously presents federal due process issues. In the state Supreme Court cases, the state court denied the tribes due process of law by proceeding to judgment in the absence of the tribes and the United States. *See generally Shields v. Barrow,* 58 U.S. (17 How.) 130, 139 (1854); *Western Union Telegraph Co. v. Commonwealth of Pennsylvania,* 368 U.S. 71, 80 (1961); *Hanson v. Denckla,* 357 U.S. 235 (1958). *See also Lomayaktewa v. Hathaway,* 520 F.2d 1324 (9th Cir. 1975), exploring the applicability of the indispensable party rule to sovereign Indian tribes.

Federal and State Civil Rule 19(b) set out four factors to be utilized to determine if a party who should but cannot be joined is "indispensable" so that the action should be dismissed in his absence. These four factors focus on the same considerations that are relevant in determining whether failure to join an indispensable party would deny him due process of law. As to the first factor, the extent to which a judgment rendered in the person's absence might be prejudicial to him, it is clear that the tribes and the United States would be severely prejudiced by the action proceeding without them. Their interest in the case was completely distinct from that of the State of Washington and the non-treaty Associations. The State cannot and did not adequately represent the interests of the tribes and the United States in the litigation.

The second factor in the rule is the extent to which, by protective provisions in the judgment or otherwise, prejudice to the non-present parties could be avoided. Since the issues presented, as perceived by the state court, included not only the "state law" issues regarding the power of the Department of Fisheries but also the scope and meaning of the treaty right itself and its constitutionality, prejudice to the tribes could not be lessened or avoided in their absence.

Relative to the third factor, the adequacy of the judgment rendered in the person's absence, it is clear that in the instant case the state court was not in any position to decree any adequate relief because of its lack of jurisdiction over the parties primarily affected by its judgment, the Indian tribes.

The final criterion is whether or not the plaintiff will have an adequate remedy if the action is dismissed for non-

joinder. Several points are relevant here. First, although the petitioning associations were not originally joined as parties in the federal litigation, they have participated in that litigation as *amicus*. In addition, as noted at length above, the State of Washington has vigorously represented the interest of the non-treaty associations throughout the litigation in the federal court. The State, as representative of the non-treaty fishermen, had vigorously raised all of the issues it could concerning the validity of the District Court's interpretation of the treaty right before the federal tribunals.

In light of these factors, the conclusion is inescapable that the tribes and the United States were "indispensable" parties to the state court actions; since they could not be joined, the state court should have dismissed the actions.

E. *The State Court Improperly Failed to Give Res Judicata Effect to the Final Judgment of the District Court In United States v. Washington*

Final Decision No. 1, *United States v. Washington*, became a final judgment for *res judicata* purposes when the United States Supreme Court denied certiorari in 1976. *Puget Sound Gillnetters* came before the Washington Supreme Court in June, 1977, well after the federal court decision became final.[441] As Justice Utter succinctly stated in dissent in *Tollefson*:

> The allocation ordered against the State by the District Court in *United States v. Washington, supra*, has been held to be within the trial court's discretion under the fair portion rule by the Ninth Circuit and the Supreme Court has denied certiorari, making that judgment final and binding upon the State as a party to that action.

441. *Tollefson* was decided by the State Supreme Court in November, 1977, and unlike *Puget Sound Gillnetters*, was decided *after* this Court's decision in *Puyallup III*, rendered June 23, 1977.

89 Wn.2d at 303, 571 P.2d at 1387-88, Petition No. 77-983, App. B-28.

Although the tribes do not contend that a federal district court or court of appeals has *appellate* authority over a state court, it is clear that in a situation where a state is a *party* to the lower court federal judgment, the judgment is binding upon the state as a matter of *res judicata* notwithstanding the fact that the judgment has not been reviewed by the United States Supreme Court. *See United States ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Stoll v. Gottlieb,* 305 U.S. 165, 170-72 (1938).

In addition, in the instant case, the State of Washington is estopped to litigate the question of its power under state law to allocate fish to treaty fishermen in order to implement the treaty by its concession made early in the litigation. In *United States v. Washington,* the District Court entered the following Finding of Fact:

> The Department of Fisheries has authority to impose limitations on the time, place and manner of sport and commercial fishing for salmon in the offshore areas within the three-mile limit, the Strait of Juan de Fuca and Puget Sound which will effectively increase the size of salmon runs through the usual and accustomed fishing places of the plaintiff tribes.

FF 204, 384 F.Supp. at 390, Joint App. at 174. The District Court's Finding of Fact was founded upon the stipulation of fact by the State of Washington in the Final Pre-trial Order, §3.615 [Admitted Facts], Docket No. 353. That stipulation still binds the State.

F. *The Question Whether the Federal District Court May Require State Officials to Perform Acts That The State Supreme Court Has Held to be Beyond Their Authority as a Matter of State Law is Moot.*

In their brief, the Associations argue that the question "whether the federal court could lawfully direct State agencies to implement the treaty by performing official functions that they lacked authority to perform under state law" is directly presented in No. 77-983. Associations' Br. at 49-50. This is false. As explained in detail in Part IV, *supra,* after the decision of the state Supreme Court in *Puget Sound Gillnetters v. Moos,* the District Court itself performed the function of allocating the resource and removed that responsibility from the State of Washington. Consistent with its policy of avoiding direct conflicts with the state courts when possible, the District Court took over the allocation function and removed it from the state courts rather than directly enjoining the state Supreme Court. Since August, 1977, therefore, no issue has been presented as to whether the State may be required to perform acts necessary to implement the federal right, which the Washington Supreme Court holds to be beyond their state law mandate.

VI. The Lower Court's Decisions Have a Positive Net Effect.

In this section the tribes analyze the State's and the Associations' accusation that the lower courts have "precipitated an economic upheaval" (State Br. 7) and their implication that the malaise of Washington's fishery can be attributed entirely to recognition of reserved treaty fishing rights. The petitioners' thesis is utterly insupportable.

In fact, the federal court's remedies have stimulated scientific research, have promoted technical cooperation, and have been consistent with congressional and state policy.

A. *Petitioners' Economic Analysis Is Wrong*

The Associations' accusation that interpretation of the Stevens treaties has "virtually destroyed" their livelihood, (Association Br. 6) is largely based on a document cited by Washington, J. Richards, *The Economic Impact of the Judge Boldt Decision* (National Marine Fisheries Service Mar. 3, 1975). (State Br. 7-8). The document cited is only a preliminary draft which was revised before release on August 1, 1975.

In reality the "report" is simply a pamphlet prepared at the behest of a state congressman[442] to support a state grant application. Federal funds were sought to reduce the number of non-treaty fishermen by buying their boats and licenses.

The petitioners' "report" states that two million dollars worth of salmon "landings" were "transferred" to treaty fishermen between 1973 and 1974. This is undocumented speculation. The facts are that between 1973 and 1974 the entire Puget Sound harvest suffered a 40% decline, while the number of non-treaty gillnet fishers pursuing those

442. *See* J. Richards, *supra* at 1. Apparently the data was used in a Washington application for $4.92 million from the U.S. Department of Commerce pursuant to 42 U.S.C. §3121 *et seq.*, *see* Implementation Grant attached to Reply Brief, July 13, 1976, Docket No. 2271. When the Washington Director of Fisheries was asked whether Mr. Richard's report analyzed the effect of the lower court's decision on the 1974 fishing season he responded, "That was the purpose I believe of that document, but as you agreed it comes quite subject to controversy." Moos deposition, April 29, 1976 at 93, Docket No. 2216.

salmon increased by over 50%.[443] These factors, not Indian fishing, explain the transfer of income away from state-licensed commercial fishers.

What petitioners do not tell this Court is that in 1973, Puget Sound gillnet fishers had a banner year, with a total catch of nearly 2,000,000 fish, (compared to the 12-year average of 1.2 million fish).[444] In 1974, the catch dropped to approximately 1.2 million, close to the 12-year average. This represented a 40% drop in fish available. This difference in catch alone could account for a substantial drop in fishermens' income.

Furthermore, 1973 was a "pink year." Pink salmon run only in odd-numbered years, and therefore were not available in 1974. This leads to great catch fluctuations between years as illustrated in the State salmon statistics, Joint App. 638. The State harvest of pink salmon was 1,000 in 1974, 1,418,000 in 1975, 2,000 in 1976, and 2,283,000 in 1977. This again would account for a significant decrease in the number of fish available for non-treaty fishermen.

Finally, petitioners failed to indicate that between 1973 and 1974 gillnet *licenses* on Puget Sound increased from 1,303 to 1,989.[445] This is an increase of 50 percent in the number of non-treaty fishermen in just one year. Thus, average catch per license due to run size and license changes alone fell from 1,566 salmon to 633 salmon, some 60 percent, between the two years.

Another way of showing the fallacy of the Associations'

443. *See* Regional Team of the Federal Task Force on Washington State Fisheries, *Settlement Plan for Washington State Salmon and Steelhead Fisheries*, Table 5-1 at 165 (1978).

444. *Id.*

445. *Id.*

argument[446] is to examine the real impact of the $2,000,000 reduction in income. The National Marine Fisheries Service Report notes that for 1974 the average income for full-time gillnet fishers was $2,630.[447] If we assume that the 686 new licensees in 1974 were full-time fishers and received the average income, their total income would account for $1,804,000 transfer away from 1973 non-treaty fishermen. Clearly as large a part of the reduced landings can be accounted for by the catches of the new non-treaty fishers who joined the chase for the salmon in 1974, as by the catches of treaty fishermen.

The petitioners' attempt to show significant dislocation and burden resulting from the decision falls flat. Their reliance upon the draft National Marine Fisheries Service report is misplaced. Even accepting the figures contained therein, the result is that the shift of income has been primarily from the fishers in the fishery in 1973 to those non-treaty fishers allowed to enter in 1974.[448] The report further

446. We choose not to belabor the obvious likelihood of bias in the National Marine Fisheries Service report. Data relied upon for the report came essentially from 622 responses by commercial non-treaty fishermen to 2,509 questionnaires sent out to all non-treaty commercial fishermen. It is surely possible, that those that suffered most were the ones that responded, or knowing the purpose of the questionnaire some of the political animosity might well have spilled over and influenced the otherwise objective and honest responses.

447. J. Richards, *supra, The Economic Impact of the Judge Boldt Decision* (Table 9).

448. Washington also calls attention to substantial drops in *net* earnings per fisherman between 1973 and 1974 (State Br. 7). Multiplied by the number of gillnet fishermen alone, they show a total decrease in *net* earnings of $9.2 million in one-year. Obviously even Richards does not suggest that a $2 million loss in *gross* revenue caused a net $9.2 million loss. The report states:

> . . . increased expenses. . . . (particularly for fuel, see Table 9), sharply lower salmon prices during 1974 compared to 1973, and possibly reduced numbers of fish for some areas and species all contributed to poorer net earnings by fishermen.

Id. at 9.

fails to accurately consider the numerous factors which may have contributed to a decline. There was a significant increase in license holders coupled with a significant decrease in the number of fish available in 1973 and 1974. Furthermore, the decline in the fishery generally,[449] the increase in the number of license holders, and environmental degradation, all have played a substantial role in bringing the non-treaty fishermen to their present position. That position or "plight" cannot be blamed upon the treaty right or the decision below. In short, petitioners' economic argument is a classic example of the *post hoc ergo propter hoc* fallacy, (after the fact, therefore *because* of the fact). It is fundamentally specious.

Then-governor Daniel Evans gave a calmer explanation of the effect of the federal court decisions:

> It is too easy for some to suggest that recent events—the Boldt and Belloni decisions on Indian fisheries, or some of the other single management decisions of recent years, have been primarily responsible for today's difficulties. I think that *any objective observer would recognize that many decisions made one by one over several generations, have led us to today's point.*[450]

The destructive forces at play in the non-treaty commercial fishery were even more precisely identified by the then Washington Director of Fisheries:

> Like the famous ecologist, Pogo of the comic strips, we have met the enemy and in many cases, he is us. *We have had a history of issuing far more commercial licenses out of our department,* and possibly the other states and their departments have too, *to harvest a resource that is limited.*[451]

449. *See* Ex. JX-2z at 20 and n. 122, *supra.*

450. Address reported in "Columbia River Salmon and Steelhead—Proceedings of a Symposium," Mar. 5-6, 1976, Ernest Schwiebert, ed. special publication #10, Am. Fisheries Society, Washington, D.C., 1977, Lib. of Cong. Catalogue No. 77-88465, at 14.

451. *Id.* at 109.

This is the crux of the problem, the source of the very real plight of Washington's commercial fishing industry. If the federal court decisions were a factor in causing Washington finally, in 1974, to freeze the number of commercial fishing licenses and, in 1975, to create a program to buy back and permanently retire licenses, then the consumers and fishermen owe the courts a debt of thanks. After ignoring for 40 years calls to limit entry the State finally realized that the alternative was "Ravishing poverty to the fishermen. . . . [t]oo much gear for too few fish."[452] A moratorium on issuing commercial licenses[453] became effective on May 6, 1974, RCW 75.28.450.

The tribes do not deny that protecting treaty Indian fishing opportunities requires limiting non-treaty fishing opportunity, *see* 573 F.2d 1130. However, since the average treaty tribal harvest between 1974 and 1977 is only 14.7% of the total Washington salmon harvest, *see* Table 6, Joint App. 640, and has only gradually risen to the level of 18% of the harvest in 1977, it is simply untrue that the difficulties of the fishing industry as a whole can be attributed to the exercise of treaty fishing rights, or the lower courts' decisions.

452. Deposition of Donald Moos, Director of Fisheries, April 29, 1976 at 29. Docket No. 2616.

453. The moratorium on licenses also demonstrates the hypocrisy in petitioners' argument that an equal share of fishing opportunity is inequitable as it reserves a tribal share which is disproportionate to the tribal percentage of the State population. Because of the license moratorium only a small fraction of the State's population can engage in commercial fishing in any event. The lower courts' decisions, therefore, simply prevents one small portion of the State's population (commercial fishermen holding licenses in 1974) from achieving an absolute monopoly over the harvest of Washington salmon, and forces them to share the harvest with the treaty tribes. Petitioners' argument made little sense in any event. Obviously, regardless of which fishermen harvest the salmon, the fish themselves become available to the general public and move in interstate commerce after sale.

B. *Positive Effects of the Lower Courts' Decisions*

The decision in *United States v. Washington* has been followed by an astronomical increase in public awareness of the serious ecological problems of the Pacific Northwest. The number of professional fisheries biologists engaged in salmon research has increased enormously, in large part through efforts of the tribes. Finally, the end to discrimination against traditional tribal fisheries has led to strengthening of tribal self-government and rejuvenation of tribal life.

As the former Director of Fisheries stated,

> The impact of the Indian problem has been overemphasized, but I believe the fact that it has been overemphasized can make it possible to use that exaggeration in some areas where we can constructively help the industry we are dedicated to serve.[454]

Fisheries management, in fact, has been greatly improved in the past five years, with the assistance of professional biologists and fisheries managers employed by the Indian tribes.[455] As a result, the sophistication of salmon management has increased markedly. As the Department of Fisheries recently concluded,

> The terminal area management practice of the past several years is making it possible to make estimates of the total run size returning to *each* Puget Sound river system.[456]

454. *Proceedings of a Symposium*, note 450 *supra*, at 108.

455. Tribal management, of course, long predates the District Court's decision, *see e.g.* FF 124, 125, 159, 384 F.Supp. at 375, 381, Joint App. 146, 158. The marked increase in available public and private grant funds and fish tax revenues since the lower court's decisions, however, has enabled the tribes to greatly expand their professional staffs. As of August 6, 1976, 32 professional fisheries biologists were working for or with treaty tribes. *See* Tribal Amicus Br., *Puyallup Tribe v. Department of Game*, No. 76-423, at A-8.

456. Wash. Dept. of Fisheries, *1977 Puget Sound Summer-Fall Chinook Methodology: Escapement Estimates and Goals, Run Size Forecast, and In-Season Run Size Updates*, Technical Report 29. (1977) (emphasis added).

The stream surveys and field work necessary for accurate estimates of escapement and run size estimation are largely prepared by tribal biologists. Tribal fisheries staff develop an intimate familiarity with the river systems in the tribes' usual and accustomed places because, unlike the Fisheries and Game Departments, tribes' efforts are focused on the terminal areas which are the location of the tribes' traditional fisheries and interest, not spread thin across the entire State.

Since the District Court decision the State and the tribes have cooperatively taken measures to increase the productivity of the fishery. Obstacles have been cleared from spawning aras and new tribal hatcheries rear and release spawning areas and new tribal hatcheries rear and release non-treaty fisheries.[457] Technical teams composed of state and tribal biologists operating under the auspices of the court's Fisheries Advisory Board have performed studies and produced valuable technical reports which were never before possible.[458]

The close relationship between state and tribal technicians has been enhanced by use of remote computer terminals with access to a central computer at the Univer-

457. *See* Tribal Amicus Br., *Puyallup Tribe v. Department of Game* No. 76-423, p. A-10-14 listing fish plants in 1975 and 1976.

458. For example, in the December 12, 1977 report of the Fisheries Advisory Board, Docket No. 5312, the parties unanimously agreed that existing Washington Department of Game methods for predicting the harvestable number of steelhead in the Green-Duwamish Rivers were inadequate. In response, a technical team was appointed to develop a new methodology. This was successfully completed and was approved by the Fisheries Advisory Board. *See,* Fisheries Advisory Report December 19, 1977, Docket No. 5312. Other technical reports have dealt with the effects of mixed stock fisheries, Fisheries Advisory Board Report 78-54, Docket No. 5313, implications of new hatchery programs, Fisheries Advisory Board Report 78-48, Docket No. 5313, and a host of other previously inadequately researched matters.

sity of Washington where catch data developed cooperatively are stored. Under this system, recently approved by the Court, all parties can obtain immediate printouts of catch data by telephone line at any time, *see* Docket Nos. 5117, 5118, and 5134. The computer terminals are increasingly being used for instantaneous communication of potential conservation problems, draft regulations, and other technical data. This harmony between the tribes and the State is simply unprecedented in Washington. It is a direct result of the District Court judge's recognition that the governmental entities have shared rights in the resource. Without the District Court's patient efforts to promote communication between the State and the tribes, the salmon resource would almost certainly have continued its characteristic modern decline.

Finally, the lower court's decision has strengthened Indian tribal government and has addressed the serious underlying problems of poverty which characterize the Indian population in Washington. The research arm of the Washington House of Representatives recently reported:

> While the number of Washington Indians may have increased in the past 100 or so years, it is a fact that the Indians living in Washington today suffer from a standard of living far inferior to that of the state's non-Indian population . . . . [I]n terms of health care, life expectancy, educational level achieved, unemployment, alcoholism, suicides, and a host of other indicators of standards of living, the *state's Indian population lags far behind its non-Indian* population.[459]

More specifically, the State legislature's data included fig-

459. Office of Program Research, House of Representatives, *The Legal Relationship Between Washington State and Its Reservation Based Indian Tribes* at 12 (Olympia, Washington 1977) (emphasis added).

ures on unemployment and the number of low income tribal members living on or adjacent to reservations of 17 of the treaty Indian tribes involved in this litigation. These figures show an average unemployment rate among the tribes' potential labor force of *40.3 percent with an additional 23.9 percent of the potential labor force earning less than $5,000 per year.*[460] This devastating unemployment graphically portrays the effects of Washington's exclusion of treaty Indians from a meaningful share in the fishery. The Indians of the Pacific Northwest have always been fishermen. "Fishing," as Dr. Lane reported, "was the universal male occupation."[461] Although there are other factors, enforcement of State fishing regulations, seizures of gear, and preemption of the fish runs are clearly factors in this result. *See* FF 193-94, 217-18, 384 F. Supp. 388, 393, Joint App. 170-71, 179-80.

The District Court's decision has presaged a dramatic change in reservation standards of living. It has also restored the "basis for [Indian] cultural identity and [provided] a cohesive force in Indian society."[462] Fishing in the usual and accustomed places has resumed. A tax base has developed for the tribes enabling them to hire additional fisheries biologists, law enforcement officers, tribal court judges and staff. This, the tribes suggest, is the result contemplated by the treaty negotiators. Dr. Lane concluded,

> [T]here was no intention of creating a class society with Indians on the bottom economic rung. The treaty commission clearly undertook to provide the Indians the means of participating and prospering. . . . The contribution was seen to be primarily in the fisheries.[463]

460. *See Id.*, at 26-45.
461. Ex. USA-20, Joint App. 365.
462. Ex. USA-20, Joint App. 394.
463. Ex. USA-20, Joint App. 396.

It is also the result most consistent with national policy. The Indian Financing Act of 1974, for example, states,

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources *and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.*

25 U.S.C. §1451 (1978) (emphasis added).

In summary, it is unfortunate that the Petitioners have chosen to cast aspersions on the federal courts, blaming the courts for problems which responsible officials attribute to ill-advised, long-term State policies. Of course, any District Court disposition of a complex case requires the litigants to make adjustments. But, analysis of the record in this case, particularly the technical reports of the parties and the Fisheries Advisory Board, shows that the lower court's decisions have promoted cooperation and focused attention on the real problems of the fishery, while assisting in fulfillment of our country's strong policy to restore and protect the rights of the treaty Indian tribes.

VII. Selected Rebuttal

The State and Fishing Associations have raised a variety of other issues. This section deals with four of them: (A) The International Fisheries Case (sockeye fishery); (B) Equal Protection; (C) Hatchery fish; and (D) Self-executing treaties.

A. *The "International Fisheries Case"*

1. Regulatory background

The State of Washington appeals 1975 District Court orders which, consistent with the court's primary decision, provided some additional fishing opportunity to treaty fishermen who fish for sockeye and pink salmon.

This is a major fishery for the tribes. We are puzzled by the State's implications that the sockeye fishery is of minimal importance to them. The State says that only a "*small number* of the Indian tribes" have accustomed fishing places" in sockeye waters; (State Br. 26-27); and that "only a small number of treaty Indians, relative to the total number of Indian fishermen, participate in the harvest of Fraser River stocks," (State Br. 27-28). These statements are wrong and misleading.[464]

464. In the first place the sockeye fishery takes place waters in which eight of the nineteen tribes with recognized fishing rights fish or 42% of the total – hardly a "small" number.

Secondly, these eight tribes comprise several of the major fishing tribes in the case area. Between them they possess most of the Indian gear of the type involved in the marine sockeye fishery; i.e. 78% of the troll gear, 69% of the marine gillnet gear and 90% of the purse seine gear. *See* Regional Team of the Federal Task Force on Washington State Fisheries, "Settlement Plan for Washington State Salmon and Steelhead Fisheries", June 1978, at 284.

Further, in 1977, in those State catch reporting areas generally covering the major sockeye runs (*i.e.*, State areas 4B, 6, 5, 6C, 6A, 7, 7A and Puget Sound terminal areas) the tribes caught 538,000 sockeye and pink salmon as opposed to only 112,000 chinook salmon in the same areas. (Ex. PLM-3 "Washington Salmon Harvest Statistics" Joint App. 635-638). Of course, chinook are substantially larger and more valuable. Still, however, to categorize the sockeye fishery as somehow a minor fishery is misleading. Nor is it accurate to say that many treaty fishermen "choose to fish" for Chinook *rather than sockeye* (State Br. 28). The entire context of the witnesses' remarks quoted in support of that allegation make it clear that they were stating that the "big" boats would definitely fish for sockeye and that fishermen with smaller gear would be able to do so if the extra days requested by the tribe were granted, but would probably fish for chinook if those extra days were denied. *See* Tr., June 20, 1975, pp. 68-79.

Fishing for these two species of salmon is controlled in certain waters by an international treaty between the United States and Canada (Convention of May 26, 1930, 50 Stat. 1355, 8 U.S.T. 1060)[465] and federal law. Sockeye Salmon Act, 61 Stat. 512, 16 U.S.C. §776 *et seq*.

The treaty basically provides that the United States and Canada will agree to conserve the sockeye and pink fishery resource and share any harvestable numbers on a 50-50 basis between the two parties.[466] It established a joint commission known as the International Pacific Salmon Fisheries Commission, (hereafter "IPSFC" or "Commission") consisting of six members, three from each country. The convention provided (Article X) that the parties agreed to enact and enforce legislation for the purpose of implementing the convention and any orders and regulations adopted by the IPSFC together with appropriate penalties for violations.

Congress implemented the convention by enacting the Sockeye Salmon Fishery Act of 1947 (61 Stat. 512, 16 U.S.C. §776, *et seq*). This Act contained comprehensive enforcement provisions including provisions for seizure, forfeiture, fines and imprisonment, all under federal authority and under jurisdiction of the United States courts. (16 U.S.C.A. §§776c, 776d). It directed the President to designate a federal agency for enforcement responsibility, but also authorized the designated federal agency to dele-

465. These waters are basically the Strait of Juan de Fuca and the Strait of Georgia through which the major sockeye and pink stocks pass on their way to the Fraser River in Canada.

466. Article VII of the convention provides that ". . . the High Contracting parties . . . [shall] share equally in the fishery." This article was modified by Article IV of the "Pink Protocol" to provide an "equal portion" of pink as well as sockeye runs. 8 U.S.T. 1057.

gate enforcement authority to officers and employees of the State of Washington. It then provided in §776d(b)):

> . . . when so authorized such officers may function as federal law-enforcement officers for the purposes of this chapter.

Subsection (d) of §776d provided that officers or employees of the State of Washington authorized by the designated federal agency were to operate in accordance with the provisions of the section governing arrests, searches, seizures and prosecutions.

The President originally designated the United States Fish and Wildlife Service as the federal agency responsible for the enforcement of the Act. (Exec. Order No. 9892). The duties of that agency were subsequently transferred to what is now the National Marine Fisheries Service of the Department of Commerce (Reorg. Plan No. 4 of 1970, 84 Stat. 2090).

However, neither the Fish and Wildlife Service nor its successor agency ever designated or authorized the State of Washington to act as its enforcement arm. Instead, a different procedure was apparently adopted, though without any statutory authority or official action on the part of the United States.

In 1949, the Washington State Legislature enacted, as part of a comprehensive fisheries code, a provision merely authorizing the Director of Fisheries to, "adopt and enforce the provisions of the convention between the United States and the Dominion of Canada . . . and the regulations of the Commission promulgated under authority of said convention." (RCW 75.40.060, L. '49, Ch. 112, §83 at 300)

After 1949, and until 1975, the Washington State Department of Fisheries each year considered the recommendations of the IPSFC, held hearings thereon, and adopted them as State regulations. All violations were treated as violations of state law and prosecuted in state courts. The State officers did not purport to be acting as federal officers under delegated authority. No federal agency entered in to the function of enforcement of the recommended regulations of the IPSFC prior to 1975, and the United States left the field generally to State action.

2. Implementation of sockeye fishing in 1975

On February 24, 1975, the IPSFC sent its recommended 1975 regulations to the United States State Department for United States approval, with the request that on approval, a copy of these regulations be forwarded to the Washington Director of Fisheries for implementation by him under Washington law. (Record in 9th Circ. Cause No. 76-1042 R. 16) On April 11, 1975, the State Department approved the recommendatons for the United States, conditional, however, on implementation by the State of Washington in conformity with the principles of the *United States v. Washington*. The recommendations were transmitted to the Washington Department of Fisheries by letter dated April 11, 1975, stating in part:

> In light of the decision in *U.S. v. Washington*, regulation in conformity with Indian treaty rights as set forth in that decision is now required. It is understood, in view of this decision, that the State will regulate in a manner consistent with Indian treaty rights.

Id. at 14, 15.

On May 20, 1975, the Fisheries Department adopted regulations which made no provision for treaty fisheries.

(*Id.*, at 14, 24) and on June 10, 1975, the United States sought injunctive relief against the State of Washington in the District Court. The State vigorously resisted the efforts of the United States to secure any separate or additional fishing opportunities for Indians (Memorandum in Opposition to Motion for Preliminary Injunction, *Id.* at 33-39).

On June 10, 1975, the District Court issued a preliminary injunction prohibiting the State from allowing any non-treaty fishing until the Department of Fisheries adopted regulations affording Indians their treaty opportunity. The injunction directed the Department to file such regulations by July 1, 1975. (*Id.* at 56, 57). On July 1, 1975, the Defendant petitioned for a stay of the injunction to July 10, 1975, which was subsequently extended until July 21st.

In the meantime, on July 3, 1975, the Director of the State Fisheries Department wrote to the Chairman of the Commission requesting authorization to adjust fishing times to accommodate Indian rights. (*Id.* at 72, Exhibit B) the Chairman replied on July 8, 1975, that the Commission had decided that the subject of division of catch between Indians and non-Indians in the United States waters "was not a proper concern for the International Pacific Salmon Fisheries Commission, whose areas of responsibility are defined by the Sockeye Salmon Convention." (*Id.* at 72, Exhibit C)

On July 19, 1975, the United States notified the Commission that by reason of the requirements of United States law as decided in *U.S. v. Washington,* the United States had withdrawn approval of "those parts of the regulations which allocate open fishing time among the various types of gear within U.S. convention waters." (*Id.* at 151) The

letter referred to the official withdrawal of approval on July 19, 1975, by Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries Affairs. (*Id.* at 154).

On July 21, 1975, the Washington Fisheries Department formally adopted the regulations prescribed by the United States District Court authorizing an Indian fishery, and the next day, July 22, 1975, filed a notice of appeal. The following day, July 23, 1975, an action was commenced in Thurston County Superior Court by the Purse Seine Vessel Owner's Association and the Puget Sound Gill Netters Association challenging the authority of the Department of Fisheries to enact such regulations. A state superior court judge issued a preliminary injunction that same day enjoining the State from promulgating any regulation which granted Indians special fishing rights and that day the State Fisheries Department repealed the regulation and suspended all of its regulations for the subject area. Neither the United States nor any of the intervenor appellees were parties to that proceeding.

On July 30, 1975, the United States District Court entered an order dissolving its previous stay of injunction and the temporary injunction, which had been stayed since July 21, 1975, went back into effect. (*Id.* at 138) The following day, July 31, 1975, the State adopted regulations prescribed in the Court's injunction. However, those regulations were scarcely in effect when the State superior court again, on August 1, 1975, enjoined the Department from enforcing those regulations. The State promptly repealed the regulations and suspended all regulatory action.

At a hearing held on August 6, 1975, the United States District Court again enjoined the State Superior Court and directed the State to repromulgate the regulations as provided in its Order of July 16, as amended on July 30. (*Id.* at 163-164)

The State however, did not thereafter promulgate the regulations mandated by the federal court but instead stood on its position that it was not capable of complying with the Federal District Court injunction, and appealed the August 6 Order.

3. Implementation during the 1977 and 1978 seasons[467]

In March 1977, the United States secured the Canadian government's agreement to a proposal for the 1977 IPSFC regulations which would have provided extra fishing time for treaty Indians. The IPSFC, however, refused to adopt this proposal. Instead, the IPSFC passed its staff recommendation for a two-day per week fishery for all United States fishermen, with no provision for the Indians' treaty rights. Accordingly, the United States, through the Department of State, advised the Government of Canada that the United States would consider achieving the same result contemplated by the government-to-government agreement through the exercise of its authority under Article VI of the Convention, as amended, to approve the IPSFC's proposed 1977 regulations only as applied to non-Indians. Fishing by treaty Indians would be governed by separate federal regulations providing the Indians with extra fishing time.[468]

467. There is no issue before this Court concerning the validity of the 1977-1978 regulatory system. We describe it here only to indicate that peculiar pattern of 1975 will not likely recur.

468. This is quite similar to the Canadian government's regulation of subsistence fishing by Canadian Indians, which has always been excluded from IPSFC coverage. In recent years, this Canadian Indian subsistence fishery has grown substantially, amounting in 1976 to approximately 300,000 fish. American Indian fishermen, both commercial and subsistence, that year caught a total of 80,000 fish. Indeed, the reservation by the high contracting countries in the Pink Protocol (8 U.S.T. 1057) of the power to approve Commission regulations before they become effective insures that such domestic adjustments can be made.

On June 1, 1977, the IPSFC forwarded to the Department of State for United States approval its proposed 1977 regulations. On June 17, 1977, the Department of State announced United States approval of the IPSFC's 1977 regulations "except as to U.S. Indians who are entitled to exercise fishing rights by virtue of treaties with the United States in U.S. Convention waters and are fishing in accordance with federal regulations providing for the exercise of such fishing rights." The Department of State advised both the Canadian Government and the IPSFC that treaty Indians would fish pursuant to regulations of the Department of the Interior and that such regulations would ensure that the Indian fishery proceeded in a manner consistent with the basic objectives of the Convention.

On June 17, 1977, the Department of Commerce adopted as federal regulations the IPSFC's 1977 regulations for United States Convention waters, with a caveat stating that the regulations would not apply to Indians exercising treaty-secured fishing rights (42 Fed. Reg. 30841). On June 21, 1977, the Department of the Interior, pursuant to its authority over Indian affairs (25 U.S.C. §§2 and 9), published separate regulations for treaty Indians fishing in IPSFC waters (42 Fed. Reg. 31450). Structurally, Interior's regulations for treaty Indians were virtually identical to Commerce's (i.e., the IPSFC's) regulations for non-

Indians; however, Interior's regulations authorized extra fishing time for treaty Indians. Unlike the situation in prior years, the United States did not ask the State of Washington adopt the 1977 Commission regulations as state law. Moreover, the National Marine Fisheries Service did not delegate its enforcement powers under the Sockeye Salmon Act to the State. Instead, the regulations for both treaty and non-treaty fishermen were enforced by the National Marine Fisheries Service and the United States Coast Guard.

4. The international fishery case was properly decided since the district court's 1975 orders are moot.

The "International Fishery Case" was properly dismissed by the Ninth Circuit as moot. The District Court's 1975 orders challenged by the State in that case are no longer in effect. Those orders were designed solely to remedy the problem existing in 1975, when the state insisted on enacting IPSFC recommendations (over objection of the United States) even though these recommendations made no provision for treaty fisheries. The orders issued were preliminary injunctions that applied only to the 1975 season, and Washington's allegations (Br. 65) that the orders are still in effect are simply erroneous.

The situation leading to the challenged orders will not recur. For the past two fishing seasons, the United States has simply refused to approve proposed IPSFC regulations that neglect to provide for treaty fisheries, thus obviating any need to return to the District Court for remedial orders. Thus, neither the court nor the State have been involved in the sockeye fishing during either 1977 or 1978. Instead, the United States has assumed direct regulatory

and enforcement control, as it is entitled to do under the Sockeye Salmon Fishery Act of 1947, 16 U.S.C. §776 *et seq*. In addition, the tribes have filed tribal regulations paralleling federal regulations so that tribal authorities may regulate the fishery through tribal courts. These changes in the regulatory pattern make this case moot. *Environmental Protection Agency v. Brown*, 431 U.S. 99, [illegible]-104 (1976). Thus, the Court of Appeals correctly held that the controversy is not one that is "capable of repetition, yet evading review." (573 F.2d at 1120, Pet. No. 78-119, App. A-30 to A-31.)

Washington's argument that the International Fishery orders should be examined on their merits because they raise the equal sharing principle vis-a-vis the IPSFC fishery is erroneous. The issue of 50-50 sharing is already present in the main litigation (*See* 384 F. Supp. at 411, A. 214) Thus, it may be resolved without resort to review of the expired temporary injunctions.

5. The District Court properly required the State of Washington to provide a special treaty fishery in IPSFC waters during the 1975 season.

Assuming that a live controversy still exists with respect to the District Court's 1975 IPSFC orders, we submit that those orders should be affirmed.

Washington's principal argument is one that was rejected by the courts below in Final Decision No. 1. The State argues (Br. 74-78) that the Convention with Canada abolished Indian treaty rights as to Fraser River salmon, notwithstanding the undisputed presence of several usual and accustomed fishing places within IPSFC waters. In advancing this argument, Washington merely sweeps aside

the repeated decisions of this Court holding that Indian treaty rights may not be abrogated by implication. *E.g., Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968); *United States v. Payne,* 264 U.S. 446, 448 (1924); *see also United States v. Lee Yen Tai,* 185 U.S. 213, 221 (1902); *Whitney v. Robertson,* 124 U.S. 190, 194 (1888). In the present case, there is not the slightest hint, let alone any express evidence, of congressional intent to diminish or eliminate Indian treaty rights. Further, there is no justification here for even an implied abrogation. It is, of course, axiomatic that the courts must attempt to construe two treaties, or statutes, harmoniously, so as to give effect to both. *Whitney v. Robertson,* 124 U.S. at 194. Here, the Convention with Canada deals only with the division of the harvest between the United States and Canada. It says nothing with respect to disposition of the American share. The Indian treaties, on the other hand, speak only to domestic allocation. Thus, there is no reason whatsoever that the two treaties cannot be harmonized by providing the Indians with the opportunity to harvest their fair share of the United States' portion of the fishery. The treaty fishery is being regulated properly both as to conservation and allocation between the two parties. Accordingly, the Convention with Canada cannot be said to have modified or superseded the Indian treaties.[469]

This position in no way conflicts with the holdings of the lower courts that Indians must comply with IPSFC regulations. Quite clearly, the courts could only have

469. This apparently, is also the view of the Commission. In 1974, the chairman stated that regulations to accommodate Indian treaty rights were "a matter for determination by the two parties to the Convention" (Ex. USA-89, p. 5.) Likewise, on January 24, 1975, the Commission resolved that the matter "was not a proper concern" for the Commission. Record in 9th Circuit Cause No. 76-1042, at 72. Ex. C.

been referring to *valid* Commission regulations—that is, regulations that have been approved by the United States under Article VI of the Convention, as amended. Just as clearly, neither court could have been intimating that the United States is bound to approve all regulations proposed by the IPSFC, even if they make no provision for treaty fisheries.[470] That question simply was not present in the original litigation. Thus, when the United States declines to approve the proposed regulations or (as happened during the 1975 season) revokes its prior approval, there simply are no IPSFC regulations applicable to treaty Indians. Hence, there is no conflict between the Indian treaties and the requirement that Indian fishermen comply with the Commission's regulations.

Washington's argument that the District Court exceeded its jurisdiction by impermissibly interfering with the conduct of foreign affairs is thus misplaced. On the contrary, the District Court deferred completely to the State Department, and only issued its orders after first receiving assurances from the State Department that the orders would not jeopardize the United States' treaty commitments to Canada. It was only after the United States had withdrawn its approval of that portion of the IPSFC's 1975 regulations which allocated fishing time among various gear types that the District Court ordered extra time to be provided for treaty gear. The District Court thus accepted the action of the State Department and concluded that the withdrawal was a valid exercise of United States' rights and responsibilities under the Convention. We submit this conclusion was inescapable.

470. For example, no one would argue that the Commission could force the United States to approve regulations allowing "whites" only to fish.

The question of the legal sufficiency of the withdrawal is a matter to be settled by the political departments of Canada and the United States; it is not a matter capable of judicial resolution. *See, e.g., Baker v. Carr,* 369 U.S. 186, 212 (1962). Thus, the District Court correctly deferred to the State Department's position on the withdrawal. And, clearly, it is the State Department's position that was properly accorded deference by the court, rather than the Commission's as argued by Washington. Under Washington's view of the law, the Commission would have greater power than either of the governments that created it. That result is at odds both with the express language of Article VI, as amended, and with common sense.

6. The current regulatory scheme is under active litigation.

Finally, we note that to the extent there are any unresolved issues involving the current regulatory scheme, those matters and being raised in two pending cases.

On June 24, 1977, suit was brought to enjoin the United States from providing extra fishing time for treaty Indians fishing in IPSFC waters. *Purse Seine Vessel Owner's Ass'n. v. United States Department of State, et al.* Civil No. C-77-471M (W.D. Wash.). The State of Washington was not a party to the litigation, nor did it seek to participate in the case. The District Court denied Plaintiffs' Motion for a Preliminary Injunction on July 5, 1977, holding that the grant of a preliminary injunction would harm the treaty Indians far more than the denial of such relief would harm the Plaintiffs and that Plaintiffs had failed to demonstrate that the balance of hardships tipped sharply

in their favor. The court also concluded that the public interest was best served by permitting the government to honor its treaty obligations to the Indians.[471]

Plaintiffs appealed. By Order dated September 27, 1977, the Court of Appeals refused to grant injunctive relief. (9th Cir., No. 77-2968). On October 26, 1978, the Court issued an opinion, unreported, holding that the District Court had not abused its discretion by denying injunctive relief. The Court declined to address the substantive issues in the case, noting that the underlying dispute concerning allocation of fishing opportunity is pending before this Court.

The same parties who brought suit in 1977 filed a second suit in 1978, in which they raised the same challenges to the United States' action. *Purse Seine Vessel Owners Association, et al v. Bureau of Oceans et al.,* Civ. No. C78-578. (W.D. Wash.). No action has been taken in that case. It, as well as the merits of the 1977 suit, is still pending in the District Court.

B. *The Allocation of Fishing Opportunity Does Not Violate Equal Protection.*

Petitioners argue that the District Court's allocation of fishing opportunity violates the equal protection guarantee of the Fifth Amendment to the United States Constitution (State Br. at 89-90, Associations' Br. at 27-30). Their argument is patently without merit. As Washington's Justices Utter and Horowitz stated in dissenting from the state court's interpretation of the Equal Protection Clause:

> The Supreme Court [of the United States] has expressly rejected this theory on at least two occasions.

471. Later in the 1977 season, Plaintiffs filed a second motion for a preliminary injunction. Holding that no new issues had been raised, the District Court denied this motion on August 10, 1977.

> Continued adherence to this discredited doctrine should be embarrassing to this court and is particularly unproductive in this case.

Passenger Fishing Vessels Ass'n v. Tollefson, 89 Wn.2d 276, 288, 571 P.2d 1373, 1379 (1977), App. B-13, Petition in No. 77-983.

The United States Constitution itself makes special provision for enactments relating to Indians, giving to Congress the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, §8, and to the Executive the power, with Senate concurrence, to make treaties, U.S. CONST. art. II, §2. Under the Associations' argument the United States could not constitutionally exercise either of these powers with respect to Indians.

The decisions of this Court have uniformly upheld federal laws which make special provision for Indian tribes as long as the special treatment is rationally tied "to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (employment preference within the BIA); *see Fisher v. District Court*, 424 U.S. 382 (1976) (exclusive jurisdiction of tribal court over adoption proceedings involving Indians on-reservation); *United States v. Antelope*, 430 U.S. 641 (1977) (constitutionality of the Major Crimes Act as applied to Indians); *Morton v. Ruiz*, 415 U.S. 199, (1974) (special eligibility of Indian people for welfare benefits); *Antoine v. Washington*, 420 U.S. 194 (1975) (exception of tribal hunting from state regulation); *see also McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959).

Petitioners' specific attack on allocation to effectuate the Stevens treaties is foreclosed by this Court's decisions first requiring, then upholding, such allocation in *Puyallup II*, 414 U.S. 44, 48-49 (1973) and *Puyallup III*, 433 U.S. 165, 177 (1977). In *Puyallup III* the Court said that allocation was "precisely what we mandated," *Id* at 177.[472]

Furthermore, the distinction between treaty and non-treaty fisheries is not based on race. As this Court said in *Morton v. Mancari, supra*, speaking of an employment preference provision,

> The preference. . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

417 U.S. at 554.

In this case, the Indians' right to distinctive treatment of their fishing rights is the *quid pro quo* obtained by them in return for their agreement to cede vast areas of land to the United States.[473] Recognition of that right is based upon

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472. At the heart of the equal protection challenge is the argument that Indians, either singly or collectively, have no claim to a greater share of fishing opportunity than the population fraction represented by their numbers. But federally-reserved treaty fishing rights cannot be quantified through comparison of population statistics, *Cf. United States v. Winans*, 198 U.S. 371, 380-81 (1905). A similar argument was advanced and rejected in *Arizona v. California*, 373 U.S. 546, 600-01 (1963). This Court implicitly rejected a similar equal protection challenge in *Minnesota v. Forge*, 262 N.W.2d 341, dismissed for want of a substantial federal question, 435 U.S. 919 (1978). In *Forge*, the state court had approved a special license fee required only of non-Indians fishing on-reservation. Certain non-Indians challenged the special license fee. This Court, in dismissing the appeal for want of a federal question, recognized the frailty of the equal protection claim. No different result is warranted here.

473. Indeed the tribes' power to exclude others who seek to take advantage of the tribal reserved right is an essential part of the property rights which the tribes retained.

the governmental status of the tribes and the special commitment of the United States to protect those rights. Non-treaty fishermen have no similar entitlement. Just as important, *Indian* fishermen who are not members of treaty tribes enjoy no special rights; their fishing is subject to the same limitations placed on all non-Indian fishermen.

Finally, the non-treaty fishermen never do explain why it is not a denial of equal protection for *them*, as a small minority of the non-Indian population of the State as a whole, to monopolize the commercial fishery. The State of Washington now limits the number of its citizens who may participate in commercial fisheries. *See* RCW 75.28.455 (Gear Limitation), and RCW 75.28.500 (Gear Buy-back). Indeed, this small minority of non-Indian fishermen seems to maintain that they should continue to virtually monopolize the fishery rather than share it with a broader spectrum of treaty fishermen. They would, of course, argue that they have "property rights" in their commercial licenses which entitle them to special treatment.

C. *Hatchery Fish Cannot be Distinguished From Wild Fish Without a Fact Finding Trial.*

Petitioners allege that the District Court's allocation fails to consider the equities surrounding artificially propagated fish. (State Br. 83, 91-92; Associations' Br. 39). This is untrue. The court has merely acted to maintain the status quo, pending full trial of the hatchery fish issue now scheduled for June 4, 1979; in the meantime, the court's orders provide that hatchery fish shall not be distinguished from other free swimming fish.[474] Washington filed notice of

474. Memorandum Order Granting Preliminary Injunction, Aug. 13, 1976, Docket No. 2347 1/2.

appeal from the court's preliminary injunction but failed to perfect it. The Court of Appeals dismissed the appeal stating:

> The [State's] failure to move promptly is inexcusable. Dismissal will not result in irreparable harm. The district court will be independently reviewable.[475]

The State did not raise the issue of inclusion or exclusion of hatchery-reared fish prior to, or during the trial in *United States* v. *Washington*.[476] Since the trial, the State has invoked the jurisdiction of the District Court to resolve the issue whether artificially propagated fish can or should be distinguished from other fish in the allocation process. The matter is pregnant with genuine issue of material fact which have never been adjudicated.[477] Indeed, the lower

475. Order dated April 5, 1977, 9th Circuit Cause No. 76-3757, Docket No. 2840 1/2.

476. Indeed, Washington mentioned the contribution of hatchery fish to the resource prior to trial only in pointing out that both the treaty and non-treaty fishermen benefitted from such hatchery programs. FPTO §3-612, 6-3, 7-96, 7-109, Record in 9th Circuit Cause No. 74-2414, R. 843, 851-52, 893, 894.

477. No hatchery fish issues relating to salmon, or to steelhead outside the Puyallup River, were adjudicated in *Department of Game* v. *Puyallup Tribe*, 86 Wn.2d 664, 548 P.2d 1058 (1976), *vacated* 433 U.S. 165 (1977). The District Court found that the state court had systematically excluded any evidence dealing with species of salmon and had dealt solely with steelhead on the Puyallup River. Memorandum Order, *supra*, Docket No. 2347 1/2. The Department of Fisheries did not even participate in the *Puyallup III* litigation. *Id.*, FF 30. The testimony dealing with other rivers and watersheds was systematically excluded, *id.*, FF 26, as was the contribution of federal funding to Western Washington hatchery facilities for steelhead. *Id.*, FF 26. Finally evidence concerning the effect of environmental damage on natural steelhead was excluded. *Id.*, FF 28. The District Court identified at least nine factual issues material to the resolution of the steelhead and salmon hatchery issue, as it applies generally. *Id.*, FF 37, 51. Furthermore, in the parties' Joint Statement of Issues presented to District Judge Orrick below, six specific factual questions relating to hatchery fish were identified. Statement of Issues, June 23, 1978, 2, Docket No. 4597. There, as elsewhere, the State concedes the need to develop a full record. *See* Reply of State of Washington Re: Motion to Modify Judgment, Nov. 16, 1977, 2, Docket No. 3687. Indeed, on remand from this Court in *Puyallup I*, the state court held a *10-day trial* solely to determine the factual issues related to the Puyallup River steelhead.

court specifically held that the hatchery issues could "only be properly and finally determined in an open court trial on the merits."[478]

The seemingly straightforward notion that anadromous fish can be artificially propagated is, in reality, a highly technical matter. Fisheries biologists cannot agree upon which fish are artificially propagated and which are not. Actions which promote or enhance fish rearing cover a huge range of activities. For example, debris removal in rivers often aids spawning. Placing suitable spawning gravel in spring-fed creeks also increases salmon production. Further along the continuum, simple riverside boxes are constructed in which salmon eggs may be incubated for a few weeks before the tiny fish fry swim free. Finally, the federal, State and tribal entities have constructed sophisticated hatchery stations in which salmon eggs are fertilized, hatched, penned and fed until desired release dates. In short, scientists disagree on the point along this continuum beyond which fish are considered artificially propagated or hatchery fish.[479]

For all of these reasons this Court should not address the question until after the lower court has developed a record, on the many factual questions identified by the parties, in the trial scheduled for June 4, 1979.

478. Memorandum Order, *supra*, Docket No. 2347 1/2, at 1.

479. Equally complex factual questions are involved in measuring federal, State and tribal contributions to hatchery programs, as well as in determining the relationship between artificial and natural fish populations in any specific river or lake.

D. *The Treaties are Self-Executing and are Being Implemented By the Parties.*

The Associations' argument that the Stevens treaties are non-self-executing (Association Br. 42-49) proves too much and therefore warrants little attention by this Court. The fundamental premise of this Court's decisions in *United States v. Winans, supra, United States v. Seifert Brothers, supra, Tulee v. Washington, supra, Puyallup I, supra, Puyallup II, supra* and *Puyallup III, supra* is that the treaties are enforceable. The petitioners offer no cogent reason for asking this Court to overrule such well-settled law.[480]

It cannot seriously be doubted that the Stevens treaties are self-executing. The clear intention of all parties was to create binding agreements which would explicitly protect the tribes' fisheries and reservation homes while passing title to certain land to the United States. These circumstances call for application of the rule that

> A treaty made on behalf of the United States that manifests an intention that it shall become effective as domestic law of the United States . . . is self-executing.

Restatement (Second) Foreign Relation Law of the United States §141 at 432 (1965).[481]

The absence of explicit language in the treaty detailing

480. If the treaties are non-self-executing then the United States has not yet extinguished Indian title to Washingthon west of the Cascade Mountains, *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) and 25 U.S.C. §177. The tribes doubt that petitioners are wholeheartedly urging an argument which will cloud the title of most landowners in the State.

481. The Court of Appeals rejected Petitioners argument saying:

> "we do not know what more would be necessary to make the treaties effective and enforceable in federal court as the supreme law of the land."

523 F.2d 1123, App. A-13, Petition in No. 78-119; *see also* 520 F.2d 684, Joint App. 44-45.

the allocation does not render it non-self-executing. In *People of Saipan v. United States Department of the Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975), the court ruled that the Trusteeship Agreement with Micronesia, which it held as comparable to a treaty for this purpose, is self-executing:

> Admittedly, the substantive rights guaranteed through the trusteeship agreement are not precisely defined. However, we do not believe that the agreement is too vague for judicial enforcement. Its language is no more general than such terms 'due process of law,' 'seaworthiness,' 'equal protection of law,' 'good faith,' or 'restraint of trade,' which courts interpret everyday.

502 F.2d at 99.

The cases cited by the Associations are not probative of the enforceability of the Stevens treaties.[482] The non-self-executing argument should be disregarded.

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482. Some of the cases are individuals challenging the government's implementation of a treaty, *Z and F Assets v. Hall*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd* 311 U.S. 470 (1941); *Jensen v. National Marine Fisheries Services*, 512 F.2d 1189 (9th Cir. 1975); and even some of those cases are considered justiciable, *see Mellon v. Orinoco Iron Company*, 266 U.S. 121 (1924). Some are cases of foreign citizens trying to create a cause of action in the United States courts based on activities that took place in foreign countries, *Dreyfus v. Von Finck*, 534 F.2d 24 (2nd Cir.), *cert. denied*, 429 U.S. 835 (1976), or don't involve a treaty at all, *National Indian Youth Council v. Bruce*, 485 F.2d 97 (10th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), *see Robertson v. General Electric Company*, 32 F.2d 495 (4th Cir.), *cert. denied*, 280 U.S. 571 (1929).

Typically when courts rule that a treaty is not self-executing, they do so because they do not wish to interfere with the political conduct of foreign relations by the Executive branch. Here the Executive branch has itself invoked judicial relief seeking an injunction to prevent interference with its implementation of treaties. Thus the political question doctrine poses no obstacle to judicial enforcement of the Stevens treaties.

CONCLUSION

These appeals represent yet another effort to overturn or circumvent implementation of the treaties made between the United States and the Washington tribes. The dispute concerning the meaning of the treaties and the scope of the restrictions they impose on State authority has been before this Court on numerous occasions. Decisions rendered by this Court have determined the basic parameters of State authority and the issues presented in the present case are not novel. This Court has already denied review of the basic underlying decision, (*United States v. Washington*, 423 U.S. 1086 (1976)), and no new circumstances are presented which would call for an avoidance of the ordinary principles of *res judicata*.

Assuming, *arguendo*, that it is necessary to examine the basis of the underlying decision, it is clear that that decision construing the treaties to mean that each of the contracting parties is entitled to an equal share of the fishery was mandated by the established evidence concerning the circumstances surrounding the execution of the treaties and by the canons of construction laid out by this Court over more than a century.

The latest series of enforcement orders entered by the Court and affirmed by the Ninth Circuit Court of Appeals and appealed here have become necessary only because of the refusal of the State of Washington and the non-treaty fishing associations to comply with the original judgment:

> Except for some desegregation cases . . . the District Court has faced the most concerted official and private efforts to frustrate its decree in this century.

Puget Sound Gillnetters v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

In these proceedings, the State and Associations argue that the treaty provided treaty fishermen no greater rights than those enjoyed by non-treaty fishermen. This Court has already rejected their argument:

> This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.

United States v. Winans, 198 U.S. 371, 380 (1905).

It is clear that the treaties did promise more and give the word of the Nation for more. Those promises must be maintained. The federal cases should, therefore, be affirmed; the State cases should be reversed with instruction to comply with the federal court orders.

Respectfully submitted this 26th day of January, 1979.

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APPENDIX

TREATY OF POINT ELLIOTT, JAN. 22, 1855

(12 Stat. 927. Ratfied March 8, 1859.)

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwamish, Suḳuamish . . . . and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Shais-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indian being compensated for any damage thereby done them.

ARTICLE 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however,* That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so that as the same may be applicable.

Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14. The United States further agrees to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens, Governor and Superintendent. [L.S.]

Seattle, Chief of the Dwamish and Suquamish tribes, his x mark.

. . . [There follows the names of other chiefs and headmen].

Executed in the presence of us—

M. T. Simmons, Indian agent.

C. H. Mason, Secretary of Washington Territory.

Benj. F. Shaw, Interpreter.